SUPREME COURT, U. S.

In the Supreme Court of the United States

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OCTOBER TERM, 1966

No. 1352

NORTHERN STATES POWER COMPANY, A CORPORATION, AND OTTER TAIL POWER COMPANY, A CORPORATION

Petitioners

VS.

RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, AS ADMINISTRATOR OF THE RURAL ELECTRIFICATION ADMINISTRATION; THE UNITED STATES DEPARTMENT OF AGRICULTURE; ORVILLE L. FREEMAN, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; AND JOHN DOE AND MARY ROE, WHOSE TRUE AND CORRECT NAMES ARE UNKNOWN TO PLAINTIFFS

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Northern States Power Company and Otter Tail Power Company, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on February 28, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. A, infra, pp. 1-28) is not yet reported.

The opinion of the United States District Court for the District of Minnesota (App. B, infra, pp. 29-46) is reported at 248 F. Supp. 616.

The opinion and order granting preliminary injunction and preliminary injunction of the United States District Court for the District of Minnesota (App. C, infra, pp. 47-56) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App. A, infra, p. 28) is dated and was entered on the 28th day of February, 1967. There has been no rehearing. The jurisdiction of this Court is invoked under *28 U.S.C.A.* 1254 (1).

QUESTION PRESENTED

The Rural Electrification Act as implemented by regulations prohibits loans for power transmission purposes unless the REA Administrator finds that existing and proposed contracts with the existing power suppliers are unreasonable and the REA, after making attempts to have them made reasonable, is unable to do so. After the Administrator had initiated negotiations with petitioners, as existing power suppliers, the Administrator, as found by the trial court, rejected the negotiations and procedures set forth in his regulations and approved a transmission loan in violation of the procedures of Regulation REA Bulletin 111-3. The question presented is:

1. Whether the Court of Appeals erred in ruling that the power suppliers in the area are without standing to enforce duties owed to them under existing regulations having the force and effect of law and as a result of which violations the power suppliers sustained unfair treatment and palpable injury.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

The Constitutional provision involved is Article III, Section 1, to the *United States Constitution*. The statutes involved are *28 U.S.C.* 1361, granting district courts original jurisdiction in actions in the nature of mandamus; *5 U.S.C.* 1009, §10(a) of the Administrative Procedure Act granting judicial review of administrative action in certain situations; *28 U.S.C.* 2201, dealing with declaratory judgments; *28 U.S.C.* 1331, granting original jurisdiction to district courts when the matter in controversy exceeds $10,000.00 and arises under the Constitution, laws or treaties of the United States; *28 U.S.C.* 1391, concerning venue in cases where defendant is an employee or officer of the Federal Government acting in his official capacity; *7 U.S.C.* 901, 904, of the Rural Electrification Act of 1936, as amended. The regulation involved is REA Bulletin 111-3, 29 Fed. Reg. 2765 (1964). All of the foregoing are printed at Appendix D, infra, pp. 57-68.

STATEMENT OF THE CASE

In 1964 at the behest of Congress (App. E, infra, pp. 69-76) the REA Administrator promulgated REA Bulletin 111-3 (App. D, infra, p. 64) and caused the same to be published in 29 Fed. Reg. 2765, et seq. This regulation provides that henceforth the Administrator in relation to

the approval of loans for generation or transmission facilities (i) would undertake power supply surveys to assure adequate review of existing and proposed power supply alternatives and to encourage closer cooperation between REA borrowers and other electric power suppliers, and (ii) if during the course of such survey the Administrator finds existing or proposed contracts with electric power suppliers unreasonable, would advise the supplier of such finding and endeavor to have the contracts or proposals made reasonable. The regulation further provides that no loan for generation or transmission facilities would be made except on certification by the Administrator that the loan is (i) needed to construct facilities to implement an existing contract or a proposed contract with the existing power supplier; or (ii) needed to provide facilities or service for which there is no existing or proposed contract from any other power supplier; or (iii) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier so involved was so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed suppliers had failed or refused to do so within the time set by the Administrator.

Northern States Power Company and Otter Tail Power Company, petitioners herein, are in the business of generating, transmitting and distributing electrical service within the states of Minnesota, North Dakota and South Dakota. They are electric power suppliers. The East River Electric Power Cooperative, Inc. organized under the Electric Cooperative Act of the state of South Dakota, is engaged in the business of the transmission of electric service. It does not own any generating facilities. Northern

States and Otter Tail have for many years been contractual wheeling agents for the Bureau of Reclamation of the Department of Interior, and provide transmission services to various cooperatives. They also supply electrical energy to various borrowers under the Rural Electrification Act. East River purchases its power supply from the Bureau of Reclamation and delivers the electrical energy over its own transmission system to its South Dakota members. The power supply purchased from the Bureau of Reclamation to East River's Minnesota members is presently being transmitted by Northern States and Otter Tail to delivery points in Minnesota.

In May, 1964 East River applied for a loan with REA to construct its own transmission lines for service to its Minnesota members. In August, 1965 petitioners brought this suit to compel the Administrator to perform a duty owed to them pursuant to his regulations (App. D, infra, p. 64). Also, relief was sought to enjoin the Administrator from disbursing proceeds of the loan to East River pending performance of the duty owed by the Administrator to petitioners in relation to the loan approved to East River. The pertinent facts as found and designated by the trial court are not, at this stage of the litigation, in dispute, and are as follows:

1. Upon the conclusion by the REA of its power supply survey the Administrator requested that petitioners herein and East River consider, discuss and negotiate a long term arrangement for power supply to East River's Minnesota members.

2. Negotiations were held between petitioners and East River during which negotiations the REA participated.

3. REA established October 5, 1964, as the final date in which petitioners were to submit to REA their definitive proposal.

4. On October 2, 1964. petitioners submitted to the REA in writing a definitive proposal, a true and correct copy of which is attached to petitioners' complaint.

5. At no time after petitioners' proposal of October 2, 1964, did petitioners receive notice from the REA, East River, or anyone else of any deficiencies or unreasonable provisions relating to said written proposal nor were any further negotiations requested by either East River or the REA relative to the subject matter of petitioners' said proposal or possible alternatives until May 17, 1965, when petitioners were notified by letter from the REA that their proposal of October 2, 1964, was not satisfactory and a few days later on May 26, 1965, REA announced approval of its loan to East River of $5,919,000.00 based upon East River's application of May 26, 1964.

6. Petitioners' definitive proposal of October 2, 1964, was timely filed with the REA and as to form and content complied with the basic requirements and material suggestions previously designated by the REA as to the format and content of any proposal that petitioners desired to present.

7. Petitioners stand ready, willing and able to provide to East River for its Minnesota members the facilities and/or service contemplated to result from the construction of an independent transmission system by East River as proposed in its May 26, 1964 application for financing filed with the REA.

8. Petitioners stand ready, willing and able to confer and negotiate with the respondents, or any of them, and East River to resolve all questions, if any

there be, concerning the reasonableness of petitioners' proposals of October 2, 1964, as power suppliers so that the proposed contract between petitioners and East River may be fair, just, and equitable for purposes of the Rural Electrification Act.

9. Respondents did not enter into or conduct the negotiations concerning the reasonableness of petitioners' proposals as power supplier to East River under petitioners' proposed contract with a fair and unbiased view of REA's duties and responsibilities to the negotiations.

10. Respondents in fact have prejudged that East River should be granted the loan requested pursuant to East River's application of May 26, 1964.

11. Respondents substituted East River's judgment and position for their own judgment as to the merits of East River's loan application, the positions of petitioners and East River to negotiations resulting therefrom, and the rights, fairness and reasonableness of the parties to such negotiations.

12. Respondents failed to find that a reasonable contract could not be obtained with petitioners, and that the purported finding by virtue of the act of granting East River's loan that a reasonable contract could not be obtained with petitioners is without evidence to support it.

13. That the proposals of petitioners were declined and not the subject of further negotiations, and the determination to grant East River's loan was done for reasons that were never raised in nor the subject of the previous negotiations. That these reasons were never communicated to petitioners privately, nor publicly announced as grounds of claimed unreasonableness during the course of the said negotiations, nor before the grant of the East River loan. That several

of these reasons were never, in fact, thoroughly investigated.

14. That respondents' actions in regard to the said loan negotiations, determinations and purported consideration of petitioners' proposals of October 2, 1964, were contrary to REA's regulations designated as REA Bulletin 111-3; were not in accordance with law; were without observance of procedure required by law; were in excess of statutory and regulatory jurisdiction of authority; constituted an unlawful failure to perform a duty owed to the petitioners; and the actions of the REA were in disregard of legal duties and responsibilities to REA borrowers and their suppliers, including petitioners, imposed by law upon the respondents.

15. That the matters in controversy and the value of the rights which each of the petitioners seek to enforce and protect and which rights have been illegally violated by respondents exceeds, exclusive of interest and costs, as to each petitioner the sum of Ten Thousand Dollars ($10,000.00).

16. That respondents are about to distribute to East River federal moneys made available by REA's approval of East River's loan application which approval was given in violation of law.

The foregoing succinctly summarizes the involved factual setting of this litigation and is supported by the "Report to the Subcommittee on Department of Agriculture and Related Agencies Committee on Appropriations, United States Senate" prepared by the Comptroller General of the United States under date of February 10, 1966 (App. F, infra, pp. 77-121) relating to an examination into alternate transmission plans considered prior to approval of

a loan to East River in which the Comptroller General stated as an overall conclusion (App. F, infra, p. 116):

> "On the basis of our review of the cost and feasibility of the straight-wheeling, joint, and independent transmission plans considered by REA prior to its approval of the independent plan, we believe that, solely on the basis of the foreseeable benefits of the joint plan—that is, estimated savings of $647,000 of investments over a longer period of time and estimated savings of $138,000 in costs of operation during a 10-year period—adoption of the joint plan would have resulted in greater economics to East River than would the adoption of the independent plan. In addition, REA considered the joint plan to offer a more reliable system than the independent plan offered.
>
> "We noted that, in approving the independent plan, REA cited certain possibilities for achieving economies under this plan which might offset the foreseeable benefits of the joint plan. The Administrator stated that, while no one of the facts, as discussed in this report, when considered separately, might have resulted in the approval of the independent plan, the combination of these factors would justify approval of the independent plan.
>
> "We believe that REA did not fully explore the possibilities discussed in this report in order to ascertain their likelihood of occurring and the resultant effect on the alternative plans. To what extent the results of further exploration might have affected REA's decision to approve the independent plan cannot be measured as of the time of loan approval; nor is it evident, as of December 31, 1965, that developments subsequent to the loan approval have either confirmed or disproved that such possibilities will materialize."

The action commenced by Northern States and Otter Tail was met by respondents' motion to dismiss claiming that REA Bulletin 111-3 was a mere policy declaration and that petitioners were without standing to sue. The trial court denied the motion and said (App. B, infra, p. 42):

> "The argument of the R.E.A. Administrator (and the other defendants) that Bulletin 111-3 was a mere policy declaration and no more than that, is fatuous. The practical realities of the situation appear to be that the Administrator wanted to satisfy the wishes of the powerful Appropriation Committees of the Congress in order to insure a favorable recommendation from them for funds, but at the same time apparently did not want to tie his own hands as to the expenditure of those funds—and hence his urging here that Bulletin 111-3 is 'simply an announcement of certain procedures in connection with loans.' But the Administrator is inconsistent. There is no legal support for his having a special 'understanding' with a Congressional Committee with reference to public funds which is not binding on him and the public. He wants to run with the hares and hold with the hounds. He secured the funds on representations made to the Congress in apparent good faith and sanctified them by the promulgation of a regulation in the Federal Register. It was relied upon by the public. Now he, like everyone else, must follow his own regulation."

Thereafter, the trial court entered a preliminary injunction (App. C, infra pp. 47-56) enjoining the Administrator from consummating the East River loan or disbursing any of its proceeds. Respondents appealed from this injunctive order. The Eighth Circuit dissolved the injunction and dismissed the case for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals decision has decided an important question of federal law, which has not been, but should be, settled by this Court, which is crystallized by the following summary:

1. The decision determines that an REA regulation has the standing and force of law.

2. The regulation creates duties to be performed by the Administrator in relation to the existing power suppliers whose service may be supplanted by the action of the Administrator.

3. The Administrator has not fulfilled these duties.[1]

4. Nevertheless, the decision of the Circuit Court of Appeals holds that the power suppliers whose rights have thus been denied have no standing to question the failure of the Administrator to fulfill those duties.

As developed below, this decision adds more confusion to the complexity of the decisions on "standing to sue" and, in some respects, is in conflict with the decisions of other Circuit Courts of Appeal and, we submit has also departed from the accepted and usual course of judicial proceedings.

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[1]This cannot be controverted in the present posture of the case, as the basic facts have been determined by the District Court upon the failure of the Administrator to obey the orders of the District Court to allow discovery or even to permit an in-camera inspection of the questioned files. The trial court's determination of such facts goes farther and holds the Administrator acted capriciously and prejudged the matter in failing to fulfill the obligations imposed by the regulations.

1. Court below erred on standing to sue and its ruling conflicts with other circuits.

That the Court should grant ceriorari to settle the important questions of standing raised by the Eighth Circuit decision becomes apparent when we examine the disagreements that have arisen between and within respectable courts, as well as other authorities. These might be summarized as follows:

1. Conflict between Circuits.

(a) Eighth Circuit's decision in this case holding Bulletin 111-3 *is* a regulation. Fifth Circuit holding Bulletin 111-3 is not a regulation.[2] Sixth Circuit holds standing to sue exists.[3] Eighth Circuit decision in this case holds otherwise.

2. Reasoning of Eighth Circuit Court's decision in this case should be scrutinized carefully in light of the thoroughly considered and persuasive decision by Judge Devitt below (App. B, infra, pp. 29-46).

3. Eminent textwriters (Professor Louis Jaffe v. Professor Kenneth Culp Davis) are in apparent disagreement as to the reasoning to be applied to the standing questions here presented.

4. This Court's own decisions on standing, it is respectfully submitted, are claimed to be confusing or in need of more consistent application by the same writers (one of whose reasoning was chosen by the Eighth Circuit and impliedly by the Eighth Circuit decision itself referring to the decisions on this question as presenting a "myriad").

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[2]*Rural Electrification Administration v. Central Louisiana Electric Company*, 354 F.2d 859 (C.A. 5; cert. den 385 U.S. 815).

[3]*Kentucky Utilities Co. v. TVA*, — F.2d — (C.A. 6, 1966; Cert. granted 35 LW 2292).

The importance of granting the writ herein, in light of the above conflicts, is underscored by the fact that this Court has already granted certiorari in the Kentucky Utilities cases.[4] Standing to sue was sustained where the matter in question was the interpretation of a territorial-limitation provision contained in a 1959 amendment to the Tennessee Valley Authority Act, 16 U.S.C. 831n-4(a). The legislative histories of said amendment and REA Bulletin 111-3 indicates a conscious parallelism by Congress that electric power suppliers not be supplanted as distinguished from implemented by federally supported programs involving public utilities.

The conflict that presently exists between the Sixth Circuit in *Kentucky Utilities Co. v. TVA*, — F.2d — (C.A. 6, 1966; cert. granted 35 LW 2292) and the Eighth Circuit in the instant matter can only be delineated as a matter of semantics by the fact that in *Kentucky Utilities Co. v. TVA*, supra, an amendment was enacted to the Tennessee Valley Authority Act, while in the instant case Congress directed the promulgation of a regulation governing the Rural Electrification Act. Such a distinction is frivolous as there hardly can be any question today that whenever an administrative agency, acting at the direction of and within the discretion validly conferred upon it by Congress,

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[4]There the Solicitor General indicated in his petition to this Court that if certiorari was granted they intend to discuss the jurisdictional question of the standing of a private utility to enforce the territorial limitation citing decisions that have held that a private utility does not have standing to challenge a loan by the Rural Electrification Administration to an electric cooperative that is in competition with the utility while the standing of state banks to challenge attempts by competing national banks to open additional offices has been sustained. This conflict prevails within the Eighth Circuit. See *Webster Groves Trust Co. v. Saxton* (8th Cir.), 1966, 370 F.2d 381.

promulgates a regulation it is "making the law" as effectively as though it were a statute passed by Congress. *U. S. v. Grimaud,* 220 U.S. 506; *Avent v. U. S.,* 226 U. S. 127; *U.S. v. Michigan Portland Cement Co.,* 270 U.S. 521.

The Eighth Circuit unequivocally held REA Bulletin 111-3 to be a regulation having a legal effect when it said (App. A, infra, p. 9):

> "We are in accord with the trial court's analysis as to the legal effect of regulations promulgated by the Administrator. Congress undoubtedly intended that the Administrator's regulations be followed, whether they speak only of internal policy or not."[5]

The cases that in the past denied standing to sue in federally supported programs involving public utilities[6] are of little or no persuasive value where, as here, petitioners' suit is grounded on a regulation for the protection of electric power suppliers formulated since those decisions.

The Court of Appeals decision marks an erroneous addition to what itself recognized as a "myriad of cases" regarding the so-called "complicated specialty of federal jurisdiction" involved in the standing cases. The Eighth Circuit decision:

1) Recognizes regulations having force and effect of law,

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[5]In *REA v. Central Louisiana Electric Co.* (5th Cir.), 354 F.2d 859, cert. den. 385 U.S. 815, the Fifth Circuit did not view Bulletin 111-3 as anything more than a pronouncement of policy to be followed or abandoned at the discretion of the REA Administrator.

[6]*Alabama Power Company v. Ickes,* 302 U.S. 464; *Tennessee Electric Power Co. v. T.V.A.,* 306 U.S. 118; *Kansas City Power & Light Co. v. McKay,* D.C. Cir., 225 F.2d 924, cert. den. 350 U.S. 884.

2) Recognizes Congressional intent that these regulations should be followed,

3) Recognizes that the record bespeaks violation of regulation,[7]

but,

4) Refuses recognition or standing in Court to those specifically named in the regulations and illegally treated thereunder.

In so holding that petitioners have no standing, the Eighth Circuit Court's decision squarely conflicts with this Court's decisions in *F.C.C. v. Sanders Bros. Radio Station,* 309 U.S. 470, and cases following the reasoning of that decision such as *Bantam Books v. Sullivan,* 372 U.S. 58 and the *Parmelle* case, 357 U.S. 77. The decision seems to hold that petitioners, otherwise clothed with all the requisites of standing, are unfrocked by their business interest in the litigation.

The Eighth Circuit's decision thus relies on the very questionable reasoning of Professor Jaffe's Law Review articles. See, Criticism in Supplements to Davis, Administrative Law Treatise, Ch. 22, on Standing. The Court incorrectly relies on *Pennsylvania R.R. Co. v. Dillon,* 118 U.S. D.C. 257, 335 F.2d 292, and *Kansas City Power & Light Co. v. McKay,* 225 F.2d 924, cert. den. 350 U.S. 884, which cases are inapplicable where, as here, special regulations create a class with standing to sue. *Gonzalez v. Freeman,* 118 U.S.D.C. 180, 334 F.2d 570, disposes of any applicability of the *Dillon* or *Kansas City Power* cases.

A reading of the applicable cases clearly shows that

[7]As it must on any motion to dismiss, and particularly in light of the designated facts as well as the Comptroller General's Report.

standing existed here and the Federal District Court's decision by a distinguished District Judge is, we submit, correct. The Circuit Court's decision, it is submitted, is erroneous. If the question of standing and its interaction with lawful regulation are doubtful in view of the "myriad of cases", then this matter is important and should be heard by this Court. Perhaps the "myriad of cases" and the "complicated specialty" of Federal law on standing should now be clarified and it should be determined whether *Sanders* is or is not still the law, as well as which Court has correctly analyzed the questions here presented.

2. Court below abnegated its constitutional duties.

The expressed language of the Rural Electrification Act provides that loans for power transmission purposes are to be used for "the furnishing of electrical energy to persons in rural areas who are not receiving central station service" (App. D, infra, p. 62). The Act sets forth no standards and contains no criteria as to areas not receiving central station service. Nor does the legislative history of the Act supply a basis for inferring precise standards. However the legislative history (App. E, infra, p. 69) that led to the promulgation of REA Bulletin 111-3 clearly indicates the desire of Congress to reaffirm congressional intent that the Rural Electrification Act was never intended to supplant private suppliers. Thus, Congress directed the REA Administrator to adopt regulations incorporating appropriate territorial-limitation provisions expressed in the terms that loans should be granted only if the loan is (a) needed to construct facilities to implement an existing contract or a proposed contract with the existing power supplier; or (b) needed to provide facilities or service for which

there is no existing or proposed contract from any other power supplier; or (c) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier involved was so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed suppliers had failed or refused to do so within the time set by the Administrator.

These regulations were more than guide lines. *Columbia Broadcasting System v. United States,* 316 U.S. 407. They were intended and did impose specific restraints upon the granting of loans for power transmission and generation purposes. Standards were now created for the determination of the Administrator in the granting of such loans.

Under the facts of this case where the trial court has clearly found the abandonment by the Administrator of his own regulations the issue thus emerges well defined as to who will enforce the restraints inherent in REA Bulletin 111-3. The Eighth Circuit calls for congressional review stating (App. A, infra, p. 27):

> "The promulgation of the regulations in question unequivocally demonstrates that the Administrator relies upon Congressional guidance and sanction. Although we doubt that Congress and the Comptroller General will desire to review every loan made by the REA they do possess the machinery and the ability for review, as in the instant case, where the parties are in good faith in attempting to reach a meeting of the minds."

An after-the-fact review by Congress of a specific loan is no substitute for the enforcement of unambiguous restraints imposed upon the Administrator in connection with

the loan making process. Indeed, it is a novel principle and a departure from accepted judicial procedure for a court to suggest that Congress and its agencies such as the Comptroller General is to perform the judicial function of enforcing regulations adopted and promulgated at Congress' direction. Regulations have no greater immunity to judicial scrutiny than statutes. They are in effect part of the Act itself, unless invalid.

The enforcement of laws is the exercise of judicial power. *General Inv. Co. v. New York Central RR.*, 271 U.S. 228, 230 (1926); *William v. United States,* 289 U.S. 553, 566 (1933). Enforcement of restraints is a judicial function. *Stark v. Wickard,* 321 U.S. 288, 309, 310 (1944); *Peters v. Hobby,* 349 U.S. 331, 345 (1955); *Leedam v. Kyne,* 358 U.S. 184, 188 (1950). The third article of the Constitution (App. D, infra, p. 57) provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." Unless Congress has withheld jurisdiction from the Courts—and there is nothing in the REA Act that withholds such jurisdiction or indicates an intent so to do—the refusal to grant judicial review is tantamount to an abnegation of the court's duties prescribed to it by the Constitution. This Court's reiteration of judicial disapproval of abandonment or abdication of jurisdiction is well enunciated. *McClellan v. Carland,* 217 U.S. 268, 281, 282; *Chicot County v. Sherwood,* 148 U.S. 529, 548.

The suggestion of the Eighth Circuit of congressional review as a substitute for judicial review is foreign to our concept of the division of powers of government. This was well stated in *Flemming v. Moberly Milk Products Co.,* 160 F.2d 259, 264, 265 (C.A.D.C.) wherein the Court said:

"The Administrator says that 'Congress was satisfied that ample safeguards against arbitrary exercise of the allocation powers would be afforded by procedures within the administrative agencies themselves and by the general supervision over administrative action exercised by the President and the Congress.' That may or may not be so as to allocation orders within the broad standards of the statutory permission, but it does not meet the question here. If applied to a specific Congressional prohibition, that doctrine would spell executive absolutism, a concept unknown to our law. By its prohibitory enactment, Congress has exercised its power of restraint, except such penal measures of impeachment or for contempt as it might apply. If the judiciary has no power in such matter, the only practical restraint would be the self-restraint of the executive branch. Such a result is foreign to our concept of the division of powers of government."

3. Import of 1962 mandamus statute presents important federal question to be settled by this court.

The dismissal of this case for lack of jurisdiction is unwarranted. Petitioners invoked the judicial power of the courts and for jurisdiction relied upon Section 10(a) of the Administrative Procedure Act granting judicial review of administrative action, *5 U.S.C.* 1009; the Declaratory Judgment Act, *28 U.S.C.* 2201; controversies arising under the Constitution, laws or treaties of the United States, *28 U.S.C.* 1331, and *28 U.S.C.* 1361, first enacted in 1962, which provides:

"The district court shall have original jurisdiction of any action in the *nature of mandamus* to compel an officer or employee of the United States or any agency thereof to perform *a duty* owed to the plaintiff." (Emphasis supplied.)

A clear delineation of the import of this recent statute is an important federal question which has not, but should be, settled by this Court. Whether or not the mandamus powers of the District Court for the District of Columbia under the common law is to be equated to the statutory mandate of Congress requiring a federal officer "to perform a duty owed" should be finally determined. That basic issue is here independent of all other jurisdictional grounds relied upon by petitioners.

Petitioners' complaint is one to compel the Administrator "to perform a duty owed" to petitioners during the course of the administrative process that the Administrator had undertaken prior to the making of a final judgment. Under REA Bulletin 111-3 the Administrator not only initiated negotiations between petitioners and East River but participated in the same. He recognized that Northern States and Otter Tail were the existing power suppliers with whom East River could contract for facilities or service requested by East River. The Administrator requested in writing a definitive proposal by Northern States and Otter Tail. This was filed within the time limit specified. However, as found by the trial court, the Administrator, contrary to the express provisions of his own regulation, refused to notify petitioners of any deficiencies or unreasonable provisions relating to petitioners' written proposal or to advise petitioners that the same was not satisfactory or, in the judgment of the Administrator, unreasonable. Once having commenced the administrative process in accordance with REA Bulletin 111-3 the Administrator abandoned his own procedures and rendered his judgment without the benefit of the information, data and facts which, if he had obtained during the course of procedures of his own regulations, would have resulted in decision making

within the limits of the territorial-limitation provisions intended by Congress. No attempt is being made by petitioners in this action to direct the exercise of the Administrator's judgment or discretion in a particular way. What is being requested is that the Administrator, before rendering final judgment, follow the procedural steps designated in his own regulations. *Service v. Dulles,* 354 U.S. 363; *Accardi v. Shaughnessy,* 347 U.S. 260.

We submit that the express language of the mandamus statute gives the Court power to direct the fulfillment of a duty of an administrative officer to exercise his judgment and discretion even though the Court would not direct the result to be reached by the exercise of that discretion. This is an important question that should be settled by this Court.

CONCLUSION

With *Kentucky Utilities Co. v. TVA, supra,* now pending before this Court the Petition for Writ of Certiorari should be granted.

Dated: May, 1967.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe A. Walters, one of the attorneys for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of May, 1967, I served copies of this petition for certiorari on the respondents named therein by depositing the same in the United States Post Office, with airmail postage prepaid, addressed to the following parties:

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

[February 28, 1967.]

Before Blackmun, Mehaffy and Lay, Circuit Judges.

Lay, Circuit Judge.

Appellees filed their complaint below to postpone and restrain the Rural Electrification Administrator from disbursing proceeds of a loan with the East River Electric Power Cooperative, Inc. The loan by the REA is pursuant to §4 of 7 U.S.C. 904, and constitutes a 5.9 Million Dollar long-term loan for the construction of transmission facilities in Minnesota and South Dakota. The complaint is to compel the Administrator to perform a duty owed to the appellees pursuant to certain regulations promulgated by the Administrator in handling the loans.[1]

Appellants filed a motion to dismiss which was heard contemporaneously with appellees' motion for preliminary restraining order as to the consummation of the loan. The lower court denied the motion to dismiss. The preliminary injunction was denied because of the failure of plaintiffs to establish "the requisite reasonable certainty or substantial likelihood of success on the merits so as to justify preliminary injunctive relief." The trial court stated:

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[1]Appellees allege jurisdiction under the following:
(1) 28 U.S.C. 1361 (Mandamus)
(2) 5 U.S.C. §1009 (Adm. Proc. Act)
(3) 28 U.S.C. §2201 (Declaratory Judgment)
(4) 28 U.S.C. §1331, §1391 (Federal Question)

> "In contrast to plaintiffs' allegations concerning disregard of the procedural requirements of Bulletin 111-3, considerable evidence indicates that defendants have indeed proceeded in accordance with the regulations."[2] *Northern States Power Co.* v. *Rural Electrification Admin.*, D.Minn. 1965, 248 F.Supp. 616, 625.

Subsequently, appellees moved for production of certain documents and correspondence regarding the negotiations leading up to the present loan. The REA claimed executive privilege by Secretary of Agriculture, Orville Freeman, and the Administrator to the various documents. The court granted an *in camera* order requiring the government to produce the documents to enable the court to examine them to determine validity of the claim. Thereafter, the appellants moved to amend the *in camera* order to require the court, in the event that their claim of privilege was overruled, to return the documents so that they might determine whether to stand on their claim of privilege. The trial court properly, we think, refused such an order. Thereafter, appellants filed notice asserting the executive privilege and their announced refusal to obey the court's order concerning the *in camera* production. On June 17, 1966, the appellees by their attorneys, moved pursuant to Rule 37(b) (2) for certain sanctions and again for a preliminary injunction. Pursuant to said motion and based upon the refusal of the appellants to produce the various documents, the court entered an order finding certain "designated facts" to be taken as true for the purposes of the action. These established facts are generally composed of the allegations of the complaint. The court also found "the

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[2]See n. 24, infra.

requisite factual showing for preliminary injunction relief . . . is now apparent," and entered an order enjoining the defendants and anyone under their control from consummating or participating in the loan to East River or in distributing any portion of said loan. Appellants filed the present appeal from the latter order.

The relationship of the parties is significant. Northern States Power Company and the Otter Tail Power Company, appellees herein, are in the business of generating, transmitting and distributing electrical service within the states of Minnesota, North Dakota and South Dakota. They are known as private power suppliers. The East River Electric Power Cooperative, Inc., organized under the Electric Cooperative Act of the State of South Dakota, is engaged in the business of the transmission of electric service. It does not own any generating facilities. Appellees have for many years been contractual wheeling agents for the Bureau of Reclamation of the Department of Interior, and provide transmission service to various cooperatives. They also supply electrical energy to various borrowers under the Rural Electrification Act. East River purchases its power supply from the Bureau of Reclamation and delivers the electrical energy over its own transmission system to its South Dakota members. The power supply purchased from the Bureau of Reclamation to East River's Minnesota members is presently being transmitted by the appellees to delivery points in Minnesota. In May, 1964, East River applied for a loan with REA to construct its own transmission lines for service to its Minnesota members.

The Complaint

Summary of the plaintiffs' complaint and the particular regulations is essential to a full understanding of the problems involved:

A. Complaint is filed to *postpone* . . . actions, for a declaration that such actions are *in violation of law)* to *restrain* REA from disbursing loan; to *compel* Administrator to perform a duty *owed* to the plaintiffs.

B. Pursuant to statute (7 U.S.C.A. 901) Administrator of REA is *empowered* to make loans to cooperative associations for construction and operation of generating plants and transmission lines for furnishing of electrical energy to persons in rural areas who are not receiving central station service. *Loans made by REA are funds from Congress made available to certain terms under annual appropriation acts.*

C. In 1963 Congress created duties and rights of private power suppliers by directing the Administrator to promulgate regulations "REA Bulletin 111-3" duly published in Fed. Register (Vol. 29, No. 40, pp. 2765-6) requiring the Administrator, in connection with any loan, to:

(1) make power survey and determine wherein the proposed contract for power is unreasonable;

(2) advise the supplier wherein such contract is unreasonable; and

(3) endeavor to get such contract modified to make it reasonable.

No loan is to be made unless a reasonable contract cannot be obtained.[3]

D. On May 26, 1964, East River made application for loan to be used for construction of independent transmission lines, including transmission system for service to Minnesota members.

E. Administrator undertook *power supply survey*

[3]A summary of the regulations (REA Bulletin 111-3) 29 Fed. Reg. 2765-6, demonstrates first a general policy statement regarding loans:

A. To seek more advantageous power supply arrangements to accomplish objectives of REA.

B. To conserve REA loan funds.

C. Surveys to assure review and closer cooperation between REA and electrical power suppliers.

(1) Power supply surveys:

(a) Borrower can request power supply survey.

(b) Conduct of survey—*if* Administrator determines to undertake it, adequate review of *applicant's* power supply problems and needs must be made. Where Administrator finds proposed contracts with power suppliers unreasonable for purposes of REA, *the supplier will be advised wherein they are unreasonable*, and the REA will *endeavor* to have the contracts made reasonable. Borrower should be made a party to such negotiations. When *necessary*, the Administrator shall advise the parties *of a definite time limit for negotiations* under survey and *a final cut-off date* for all proposals *which are to be considered in EVALUATION* of loan applications related to the problems and needs covered by the survey.

(c) No loans will be made until a power supply survey has been completed.

(d) Certification is required by Administrator of loans for generation or transmission facilities to Secretary of Agriculture that the loan is needed based upon the power supply survey which shows . . . proposed contracts to provide facilities to be financed were *found* to be unreasonable, *each supplier was so advised, REA attempted to make contracts reasonable*, and the proposed suppliers failed to do so in the *time set by Administrator*. If the loan is for more than $2,000,000 certification must also be made to the Comptroller General, Senate and House of Representatives with specified detailed information furnished. As to the specifics required, see n. 17, infra.

and requested plaintiffs and East River to consider, discuss and negotiate long-term arrangement for power supply to East River members:

(1) A conference was held on June 11, 1964, by representatives of all parties;

(2) Proposal for "Joint Plan" sent to East River on July 9, 1964, rejected by East River on July 27, 1964;

(3) On August 3, 1964, REA states proposal must meet certain requirements and submit final plan by October 5, 1964;

(4) Plaintiffs submitted its proposed plan on October 2, 1964;

(5) May 17, 1965, notification by REA that proposals were not satisfactory and loan to East River would proceed.[4]

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[4]For reasons which will become apparent, we set forth the Administrator's letter, offered below as "Exhibit O".

"This letter is to advise that REA has just completed a long and careful study of the various plans proposed and available for delivery of power by East River Electric Power Cooperative to its member distribution cooperatives in Minnesota. This study has included a comprehensive review of both the straight wheeling proposals offered by Northern States Power Company and Otter Tail Power Company for delivery to the distribution cooperatives over wholly owned company facilities and the final offer of Northern States Power Company and Otter Tail Power Company as set forth in your letter of October 2, 1964, for delivery of power to East River's Minnesota members over company owned transmission lines in exchange for the construction by East River of facilities in South Dakota beneficial to the companies.

"As you may agree, our analysis has extended over a considerable

F. Plaintiff complied with basic requirements and with all basic suggestions made in August. Plaintiffs are ready, willing and able to provide services and

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period of time because of the long history of correspondence, meetings, negotiations and studies concerning the power supply problems of the East River Electric Power Cooperative in Minnesota. These ranged from the discussion in March 1963 to the final offer of Northern States Power Company and Otter Tail Power Company, dated October 2, 1964, and East River's own application for funds for an independent transmission system. However, as you may recall from our telephone discussion in late December 1964, I advised that the REA analysis of your final proposal of October 2, 1964, would require more time than we had first anticipated. Because of this delay your telegram of December 30, 1964, which confirmed that the existing wheeling rates would be kept in effect for any period desired by East River was greatly appreciated.

"We have advised previously that the straight power wheeling arrangement now in effect results in higher costs to East River than those under other alternatives available including independent construction. Your final offer of October 2, 1964, has now been completely analyzed in all its aspects and indicates only very marginal annual economic benefits based on normal REA estimates and forecasts. However this offer also involves the disadvantages of higher initial investment required, the possibility of increased costs to East River which could develop under the proposed arrangement over which neither the cooperative nor companies would have control, and a lack of flexibility by which East River might take advantage to possible future beneficial joint arrangements with your companies, the U. S. Bureau of Reclamation, the Missouri Basin Systems Group, or others.

"Because the marginal economic benefits indicated in your final offer do not seem to compensate for the restrictions involved, including the sacrifice of possible future advantageous cost saving arrangements by East River, and in view of the fact that certain likely developments could offset even the marginal benefits, we have decided to proceed with consideration of the plan for East River to provide power deliveries to its two member cooperatives in Minnesota by means of the planned independent facility arrangement. Considering the above, as supported by our studies, we believe that it would be unreasonable to commit East River to either of the offered alternatives.

to resolve all questions concerning the proposed contract.

G. *Defendants failed and refused to*

(1) advise plaintiffs wherein their proposal of October 2, 1964, was unreasonable or deficient;

(2) *endeavor to have the proposal made reasonable* or the deficiencies corrected. The failure and refusal constitutes:

(a) a willful violation of REA regulations;

(b) an unlawful failure to perform duty owed to plaintiffs, and

(c) a denial of plaintiffs' rights.

H. Defendants arbitrarily set a cut-off date for negotiations and prejudged the loan substituting East River's judgment for their own.[5]

"We would like to emphasize that even though REA should make a loan to East River for transmission facilities in Southwest Minnesota, such loan will not preclude any subsequent arrangements the companies and East River may desire to negotiate in the future pertaining to specific power delivery requirements. We sincerely thank you and Mr. Nye for your good cooperation in the long negotiation and exploration of alternative methods of delivery of power to East River's member systems."

The Administrator expanded these reasons in a requested letter by the Senate Appropriations Committee on June 21, 1965. See n. 20, infra.

[5]The complaint reads:

"The defendants failed to find that a reasonable contract could not be obtained with plaintiffs, and any purported finding that a reasonable contract cannot be obtained is without evidence to support it."

The trial court made a finding to this effect under appellees' motion pursuant to Rule 37(b) (2).

I. Reasons for rejection were not communicated to plaintiffs.

J. Purported certifications were arbitrary and capricious and in excess of statutory authority and were without observance of procedural requirements.

As a result thereof, appellees have incurred damages in the sum of $1,000,000. Appellees pray to enjoin loan pending performance of duty to effectuate a reasonable contract by advising in writing of deficiencies and unreasonableness of their proposal of October 2, 1964; and endeavor with "deliberate speed" to make the proposed contract reasonable, if at all possible; and otherwise comply with regulations.

The Regulations

We are in accord with the trial court's analysis as to the legal effect of regulations promulgated by the Administrator. Congress undoubtedly intended that the Administrator's regulations be followed, whether they speak only of internal policy or not. See *Columbia Broadcasting System* v. *United States*, 316 U.S. 407.[6] However it does not

[6]In the *Columbia Broadcasting System* case, Chief Justice Stone said:

"The Commission argues that, since its Report characterized the regulations as announcements of policy, the order promulgating them is no more subject to review than a press release similarly announcing its policy. Undoubtedly, regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one 'which we will follow in exercising our licensing power,' they must be taken by those entitled to rely upon them as what they purport to

necessarily follow, as the trial court has assumed, that the legal status of the regulations necessarily permits review by the appellees herein.[7] In *Schilling* v. *Rogers,* 363 U.S. 666, the Supreme Court in reviewing *statutory* restrictions on the Custodian under The Trading With the Enemy Act stated:

> ". . . we think the congressional decision to spell out in some detail certain limitations on the power it was conferring on the Executive was not designed to bestow rights on claimants, arising out of an assertedly too-narrow reading by the Executive of the discretionary power given him. Rather we consider the specifications . . . as designed to provide guides for the Executive, thereby lessening the administrative burden of decision. . . ."

A. *Standing* by "public interest".

Although concepts of standing, judicial reviewability and justiciable controversy are intermingled in the area of administrative review, our analyses compels reversal under any or all of these jurisdictional bases. Appellees' brief well demonstrates isolated statements and cases dealing

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be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others *whose rights* may be affected by the Commission's execution of them. The Commission's contention that the regulations are no more reviewable than a press release is hardly reconcilable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant." 316 U.S. at 422.

[7]This is the same error pursued by the District Court in *Schuetzle* v. *Duba,* 201 F.Supp. 754, at 758, reversed by this court in 303 F.2d 570.

with agency review are not all simply reconciled.[8] However, distinguishing factors become readily apparent in review of the myriad of cases.

The Rural Electrification Administration's powers are all exercised by the Administrator under the supervision of the Secretary of Agriculture. 7 U.S.C. 901. The Administrator, in §§902 and 904, is "authorized and empowered to make loans" for the development of rural areas deficient in rural electrification. Under the same or similar statutory authority appellees readily recognize that the interest of the economic competitor is not sufficient standing to challenge the authority or discretion of the Administrator to make loans. *Alabama Power Company* v. *Ickes*, 302 U.S. 464; *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118; *Duke Power Co.* v. *Greenwood*, 302 U.S. 485; *Kansas City Power & Light Co.* v. *McKay*, D.C.Cir., 225 F. 2d 924, cert. den. 350 U.S. 884; *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 5 Cir., 354 F.2d 859; *Alabama Power Co.* v. *Alabama Electric Coop., Inc.*, M.D. Ala. N.D., 1965, 249 F. Supp. 855. Nor did passage of the Administrative Procedure Act create legal rights which otherwise did not exist.[9]

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[8]Perhaps the most realistic balance to judicial review as to administrative conduct even under the Administrative Procedure Act, is found in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301, a pre-APA case: "Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review, the *type of problem involved* and the *history of the statute in question* become highly relevant in determining whether judicial review may be nonetheless supplied." (Our emphasis.)

[9]As this court pointed out in *Duba* v. *Schuetzle*, 303 F.2d 570, at 574:

> "It has also been judicially determined that the Administrative Procedure Act was not designed to and in fact has not changed the

The Supreme Court has long recognized that an "enforceable right" must be more than "a common concern for obedience to law." *Singer & Sons* v. *Union Pac. R.R. Co.*, 311 U.S. 295 at 304. Nor is standing given to the appellees as representing "the public interest" analogous to *F.C.C.* v. *Sanders Brothers Radio Station*, 309 U.S. 470. Some interpretations of *Sanders* make the area confusing and more complicated. See e.g., *American President Lines*

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basic principle that one must have suffered a *legal wrong* in order to have standing to challenge programs administered by governmental agencies. The scope of review under §10 (a) of the Act, 5 U.S.C.A. §1009(a) was reviewed and considered at length in *Kansas City Power & Light Company* v. *McKay*, 96 U.S.App.D.C. 273, 225 F.2d 924, cert.den. 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780, where private electric power companies sought to enjoin federal officers and agencies from carrying out a federally supported power program, alleging loss from unlawful competition from Government contracts. The court, at pages 932, 933, of 225 F.2d, considered the history of the Act, observing that in the view of the attorney general, §10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co. v. Ickes*, supra, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374; *Commonwealth of Massachusetts* v. *Mellon*, supra, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078; *Perkins* v. *Lukens Steel Co.*, supra, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1103, and ruled that plaintiff companies gained no standing to sue by reason of the Act. See also *Ove Gustavsson Contracting Company* v. *Floete*, 2 Cir., 278 F.2d 912, 914, cert.den. 364 U.S. 894, 81 S.Ct. 225, 5 L.Ed.2d 188."

See Jaffe, *The Right to Judicial Review II*, 71 Harv.L.Rev. 769 at 790, "The Administrative Procedure Act has had a negligible effect on the basic right to judicial review. . . ." See also *Braude* v. *Wirtz*, 9 Cir. 1965, 350 F.2d 702, at 707, where the court pointed out, to support standing to sue under §10(a) of the Act it is not enough for appellants to show that they have been "adversely affected or aggrieved." In addition, there must be a showing of adverse effect or aggrievement under "a relevant statute." In the *Braude* case a regulation promulgated by the Administrator of the Bureau of Employment Security was claimed to have been violated. The court refused review, since appellees could show no *legal wrong*.

v. *Federal Maritime Board*, D.C.D.C., 112 F. Supp. 346.[10] The theory of *Sanders* is extended in *Associated Industries* v. *Ickes*, 2 Cir., 134 F.2d 694, which allows review of any administrative order when the "public interest" is being represented by any person "aggrieved," acting as "a private Attorney General." Of course, the concern of the public *is* involved when a regulatory charter is being granted or denied by some administrative agency. *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4. Thus, "when an existing *licensee* offers to prove that the economic effect of another station would be detrimental to the public interest" the court will review. See *Carroll Broadcasting Co.* v. *F.C.C.*, 258 F.2d 440, 443, followed recently in *Southwestern Operating Co.* v. *F.C.C.*, D.C.Cir. 1965, 351 F.2d 834. See also *Panhandle Eastern Pipeline Co.* v. *F.P.C.*, C.A.D.C, 169 F 2d 881 [existing natural gas supplier has standing to challenge certification of competitor]. Cf. *Webster Groves Trust Co.* v. *Saxon*, 8 Cir., Dec. 14, 1966, . . . F.2d . . . . Any claim of representation of "public interest" by appellees herein is found in their abbreviated reliance on *Western Pac. Calif. R.R. v. Southern Pac. R.R.*, 284 U.S. 47, and *Texas & Pac. Ry. v. Gulf C. & S. F. Ry.*, 270 U.S. 266. However, the agency conduct in those cases

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[10]Appellees reliance upon the *American President Lines* v. *Federal Maritime Board* is misplaced. Argument was therein made that the doctrine of *Alabama Power Co.* v. *Ickes*, supra, is not applicable to proceedings under the Administrative Procedure Act. This case is disapproved in its own circuit, *K. C. Power & Light Co.* v. *McKay*, 225 F.2d 924, at 932. This viewpoint is not shared by others: *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, at 152-3 (concurring opinion); *Duba* v. *Schuetzle*, 303 F.2d 570; *REA* v. *Central La. Elec. Co.*, supra; *Bevy* v. *Housing & Home Financing Agency*, 2 Cir. 1965, 340 F.2d 939; *Penn. R. Co.* v *Dillon*, D.C.Cir. 1964, 335 F.2d 292; *Pittsburg Hotels Assoc.* v. *Urban Redevelopment Auth.*, 3 Cir., 309 F.2d 186; *Harrison Halsted Commun. Group, Inc.* v. *Housing & Home Finance Agency*, 7 Cir., 310 F.2d 99, cert.den. 373 U.S. 714.

is too remote from the instant facts. The decisions in *Alabama Power* and *T.V.A.*, both decided subsequent to the *Western Pac.* and *Texas & Pac.* cases deny that standing is derivative from "public interest" in federally supported programs involving public utilities.

B. *Standing* by "regulation."

Elsewhere in their briefs appellees insist that "freedom from competition is not the basic issue here" but in fact their complaint is one of individual injury by reason of "unfair treatment" by the Administrator's noncompliance with his own regulations.[11] Appellees claim that *Alabama Power, Kansas City Power,* and *T.V.A.* are distinguishable since the regulations were not promulgated at the time of these decisions.[12]

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[11]Appellees stated:

"... this action is one to compel the performance of a duty in compliance with regulation, and not one to influence the ultimate decision of the agency. The case seeks compliance with regulation, not control of discretion." (Appellees' Brief, p. 49.)

[12]Appellees' reliance on the language of the *K.C. Power* case, suggesting standing where "regulatory action" by the government is involved is ineffective. The "regulatory action" to which reference is made, concerns "situations" such as *Sanders* under the F.T.C. or any other administrative body regulating rates, licenses, charters, et al. Appellees distinguish the *Cleco* case, 5 Cir., 354 F.2d 854, since it dealt with the regulations only collaterally.

Actually the Fifth Circuit was faced with the identical regulations and arguments as in the instant case. The court therein briefly disposed of the regulations without the apparent difficulty that we have encountered. It is true there were additional claims raised in the complaint, i.e., violation of Anti-trust Law, illegal competition and constitutional claims under the Fifth Amendment. However, appellants' petition for certiorari, denied on November 21, 1966, No. 117, S.Ct., clearly relies on the same procedural deficiencies arising under Bulletin 111-3, as appellees claim here. We agree with the Fifth Circuit's holding that appellees there, as here, have no standing to sue.

Therefore, we are instructed that we must search the regulations to determine whether appellees have any legally enforceable rights to give standing to sue. The language of the bulletin sets forth the procedure that is to be followed by the Administrator in conducting a survey to consider a *borrower's* loan application. The *power supplier* has *no enforceable right* or *privilege* to obtain a contract or to otherwise have its proposal accepted.[13] The regulation states the Administrator will *endeavor* to make the proposals of the suppliers reasonable within a definite period of time.[14] If appellees' position is correct, short of obtaining

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[13]We do not overlook appellees' reliance on *Gonzales* v. *Freeman*, D.C. Cir., 334 F.2d 570. There the Administrator took direct action against appellants, depriving them of eligibility for government contracts. The court said, "appellants have a right not to be debarred except in an authorized and procedurally fair manner." 334 F.2d at 576. See also *Service* v. *Dulles*, 354 U.S. 363 and *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, where direct administrative action against Service and Accardi was prohibited without following the applicable procedural safeguards.

The distinction between those cases and the instant one is readily apparent. The action of the Administrator in this case is to effect a loan consistent with the policy of the Rural Electrification Act and does not operate to deprive appellees of any rights. As was stated in the *Cleco* case: "Service and Accardi had a direct justiciable interest in what was about to happen directly and specifically to personal rights guaranteed by law. Appellees are not being *granted* or *denied* a loan in violation of the law or in violation of regulations having the force of law." 354 F.2d at 865.

[14]The appellees in their complaint request the court to order defendants to "perform the duty owed to plaintiffs" by "advising" them of deficiencies in their October 2, 1964, proposal and to "endeavor" to make them reasonable "if at all possible." Their alleged authority is 28 U.S. C.A., §1361, which reads:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

a determination of "reasonable," they could always cite the Administrator as failing to "endeavor" to make the proposals reasonable. The regulations say the Administrator will inform the suppliers of the deficiencies. But the regulation does not give the supplier the *unconditional* right to have its proposal accepted. On the contrary, these requirements are designed to place sufficient information in the hands of the Administrator in order that it "*be considered in evaluation* of loan applications related to the problems and needs covered by the survey."

Appellees contend they have standing since they belong to a special class which is the intended beneficiary of the regulations promulgated by the Administrator. See *Ken-*

This statute, which was passed in 1962 largely to extend the remedy to courts outside the District of Columbia, "did not enlarge the scope of mandamus relief." *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall*, 10 Cir., 355 F.2d 364, 367; *Smith* v. *United States*, 10 Cir. 333 F. 2d 70, 72. Traditionally, mandamus is used to compel the performance of a ministerial duty or to compel the exercise of discretion when such is required, but never to influence that discretion. *Wilbur* v. *United States, ex rel. Kadrie*, 281 U.S. 206; *United States* v. *Wilbur*, 283 U.S. 414; *Work* v. *United States ex rel. Rives*, 267 U.S. 175. Compare 1962 U.S. Code, Congressional and Administrative News, p. 2785. Moreover, the duty must be plainly defined in the terms of the applicable law. In explaining the mandamus remedy the court in *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309, 317-18, illustrated it by saying:

> "But where the duty to act turns on doubtful or highly debatable matters of inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion."

The requirement to "endeavor to have the contracts or proposals made reasonable" is certainly "loose" terminology which is highly susceptible to the Administrator's discretionary interpretation. This is especially true in view of his authority to "limit . . . negotiations" and set "a final cut-off date . . ." Insofar as appellees seek a mandamus "to direct the retraction or reversal of action already taken . . ." they must fail. See *Wilbur* v. *United States ex rel. Kadrie*, supra, at 218.

tucky Utilities Co. v. *T.V.A.*, 6 Cir., No. 16,491, decided November 15, 1966. They claim the objectives of the regulations are to protect the rights of the private power suppliers. We would agree with the general proposition that Congress through the REA is not interested in using governmental power to supplant private enterprise. See H.R. Rep. No. 423, 89th Cong., 1st Sess. 33 (Sen. Holland). However, such an expression of policy in and of itself does not grant a legally enforceable right in the utility to maintain it. *Tennessee Power Co.* v. *T.V.A.*, 306 U.S. 118, at 141. The authority of the REA to grant loans to electrical cooperatives could otherwise be thwarted. As the House Committee on Appropriations said, the right to make loans for generating and transmission purposes is deemed "absolutely essential to enable REA coops to obtain reasonable contracts with private suppliers with regard to rates, terms and conditions." H.R. Rep. No. 355, 88th Cong., 1st Sess. 7, (1963).[15] The announced *responsibility* of the REA in

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[15]". . . the requirement of a dual rate by the private supplier, whereby a higher rate is charged for increased quantities of power for the purpose of cutting off prospective customers in areas served by co-ops, appears unjustified and is an invitation for electric cooperatives to seek generation and transmission loans." H.R. Rep. No. 355 at p. 8.

The Senate Committee on Appropriations stated:

"The success of the rural electrification program in bringing electricity to the farms and rural areas has been an outstanding development in the past quarter century. It has benefited both the rural and urban segments of the national economy. The electrification of rural areas brought to rural residents the advantages of modern living which city people had long enjoyed. Power-type equipment operated on farms has opened a vast market in manufacturing and commerce. Nonfarm employment opportunities have expanded. The rapid growth in the economy has in large part developed from the contribution that REA-financed electrification loans has brought to the rural areas.

conducting the power supply survey, which is the gist of the regulation in question, is twofold: (1) to render assistance to borrowers in obtaining the "most advantageous power supply arrangements," and (2) to conserve REA funds.[16] See Bulletin 111-3, supra. The bulletin does make a general policy statement that the power supply survey "assure adequate review of existing and proposed power supply alternatives" and "encourage closer cooperation between borrowers and other electric power suppliers." However, this statement must be read in conjunction with the expressed concern of the REA that the "terms and conditions" of power supply arrangements are major and critical factors in REA borrowers ability to carry forward the rural electrification program. If anyone is the beneficiary of the regulation, it is the rural consumer of cheap but efficient electrical energy. The intent of the regulation

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"During the course of the hearings this year, the committee had presented to it, as it has in the past, widely divergent views with respect to REA loans for generation and transmission facilities.

"As previously stated, this committee believes that both the rural electric cooperatives and the private power companies who furnish most of the supply of energy needed to serve the electric cooperatives are here to stay and they should make every effort to enter into earnest negotiations in reaching power supply contracts because it is to the mutual advantage of the cooperatives and the private companies to enter into satisfactory power supply arrangements." S. Rep. No. 497, 88th Cong. 1st Sess. 27 (1963).

[16]Even prior to the passage of this Bulletin, REA Bulletin 20-6 was in existence having been promulgated by the Administrator May 31, 1961. This particular bulletin is made expressly applicable to all loans at the present time by its incorporation within Bulletin 111-3. This original bulletin requires the Adminstrator to make a predicate finding to any loan that (1) no adequate and dependable source of power was otherwise available, (2) rates charged to a consumer were higher by private suppliers than by cooperatives, and (3) that the generating and transmitting facilities were necessary to protect the security and effectiveness of the REA finance system.

is to assure the borrower, not the private power supplier, the "most advantageous power supply arrangement."

It is difficult to conclude that the purpose of the regulations is to provide previously nonexistent rights to the private power supplier. The federal program under the REA is specifically for the benefit of rural families to have modern and efficient electrical facilities at the lowest rates possible. The implementation of the REA program requires a pragmatic concern for both economy and facility to the borrower, as well as to the consumer. In overseeing the Act, Congress properly is concerned in the conservation of the funds involved. This discerning interest may work to the advantage of the private power supplier, but in many instances it also can result in their economic disenchantment. In administering the REA program "freedom from competition" is not a legitimate end of the legislation or the regulations promulgated thereunder. More appropriately, we feel the responsibilities under the regulation are as set forth in its preamble. The language and the legislative background of the regulation makes it apparent that Congress was merely seeking a more effective means to police the REA loans.[17] Under such circum-

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[17]Bulletin 111-3, as promulgated by the Administrator additionally requires the following detailed information on all loans certified by the Administrator to be furnished the Secretary of Agriculture, the Comptroller General, the Senate and the House:

1. The name and address of the applicant borrower and the date of the application.

2. Description and estimated cost of the proposed generation facilities. Indicate if the proposed facilities are the initial or additional unit or units of a plant comprised of one or more units.

3. Description and estimated cost of proposed transmission facilities, including any immediate or future plans to interconnect with other transmission systems.

stances we find Congress did not intend to create any legally enforceable rights for the private power supplier.

Lack of Judicial Reviewability

However, notwithstanding appellees' claim to certain benefits under the regulations, they have otherwise failed to state a "justiciable controversy."[18] Their complaint re-

4. Description of any long-range plans the applicant may have for construction of additional generation and transmission facilities and the estimated cost of the planned facilities.

5. Comparison of the estimated cost of generation by the applicant borrower with the cost of power available from existing suppliers, including the final offer by the private supplier including terms and conditions he offered to meet applicant's long-term energy needs.

6. Summary of the efforts made by the applicant and by REA to obtain the applicant's power and energy requirements from existing power suppliers and the reasons why such efforts have not been successful.

7. Explanation of the applicant's reasons for seeking an REA loan.

8. The amount of electric energy which the applicant will cease to purchase from present power suppliers upon construction of the generating plant for which REA financing is being sought.

9. Explanation of the extent to which the feasibility of the requested loan for generation and transmission facilities depends upon the use of a portion of the facilities by others (including Federal power marketing agencies).

10. Details of the applicant's plans to sell or otherwise make available any of the power and energy from the proposed generation facilities to others (including Federal power marketing agencies).

11. Names of State agencies and commissions having jurisdiction over the applicant borrowers.

Senator Holland refers to the above as a "review program." See Senate Committee Hearings, H.R. 14596, 987-8, infra, n. 28.

[18] *Anti-fascist Committee* v. *McGrath*, 341 U.S. 123, at 150 Mr. Justice Frankfurter (concurring opinion) said:

> ". . . The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.' The scope and consequences of the review with which the judiciary is entrusted over executive and legislative action require us to observe these bounds fastidiously."

lates to a phase of an incomplete process of the exercise of administrative discretion. The agency conduct does not invoke any final or adjudicatory order or process which legally wrongs appellees. Every step delineates an investigative stage directed toward accumulation of factual material for the Administrator's expertise evaluation.[19] The ultimate authorization of the loan, which appellees really want to prevent, does not and cannot involve a legal wrong to appellees.

It is patent the judicial action sought by appellees is still subject to subsequent revisory executive or legislative action.[20] Appellees attack the negotiation stages only.

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[19]Mr. Justice Brandeis in denying a review of an order under the Valuations Act by the I.C.C., said:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith* v. *Interstate Commerce Commission*, 245 U.S. 33. *Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later.*" (Our emphasis.)

United States v. *Los Angeles & Salt Lake R. R. Co.*, 273 U.S. 299, at 309-10.

[20]Reviewing the Administrator's reaction to appellees' claims in the Congressional hearing, any court enforced renegotiation, be it possible, would in all likelihood not change the Administrator's positive attitude of decision. Immediately before appellees filed the present suit (April-June 1965), the Senate Subcommittee on Agricultural Appropriations held hearings on the East River loan, reviewing the Administrator's certification of the loan to Congress. See notes 21 and 28 infra. Mr. Clapp,

These lead up to (1) a finding of reasonableness or unreasonableness of the supplier's proposal, (2) evaluation of all proposals for further consideration of the borrower's loan application, (3) certification of approval of the loan to the Secretary of Agriculture, the Comptroller General, the House of Representatives and the United States Senate.[21] See Bulletin 111-3, supra. See Jaffe, Judicial Con-

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Administrator of the REA, testified at the hearings concerning appellees' proposals and said in part:

> "The reasons we regarded the proposal as unreasonable are those that I have stated here this morning. It tied the hands of East River and prevented it from taking advantage of possible future economies in its operations which would be available to it under the independent system; it foreclosed certain possible incidental revenues which might be available to it under the independent transmission approach.
>
> "In view of the small difference between the two plans costwise to begin with, we felt that the prudent approach was to make the smaller loan and take advantage or make it possible for East River to take advantages of this flexibility which it provided, and that it would be unreasonable to foreclose East River from doing so."

Hearings on Agricultural Appropriations, 1966, before a Subcommittee of the Senate Committee on Appropriations, 89th Cong., 1st Sess., H.R. 8370, pt. 2, at 497 (1965). See also the Administrator's letter of June 21, 1965, to the Subcommittee setting forth additional explanations, commencing at 676.

As Professor Jaffe points out, even where standing otherwise exists, as in *Accardi*, supra, et al., "on remand the agency often issues the same order stricken out in the requisite garb." Jaffe, Judicial Control of Administrative Action, 103, 589 (Little, Brown & Co. 1965).

[21]The Congressional Committee theoretically is still reviewing this certification. See n. 20, supra. Senator Holland wrote the Comptroller General on August 18, 1965, six days after commencement of this litigation:

> "During the hearings this year, the attention of the Committee was directed to the loan announced on May 24, 1965 to the East River Power Cooperative, Inc., Madison, South Dakota, for the construction of transmission facilities in the aggregate amount of $6,136,343. Committee examination resulted in conflicting testimony from the

trol of Administrative Action, 100-3, supra. Even then the Secretary of Agriculture must ultimately approve and request the Secretary of the Treasury to loan the money to the Administrator, 7 U.S.C. §903. Appellees concede in their brief, as well as in oral argument before the court, they are not attacking the certification, see n. 11, supra.[22]

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private power supplier versus that of the Administrator of the Rural Electrification Administration, and near the conclusion of the hearings I requested that both sides—namely, the REA and the representatives of the Northern States Power Company of Minneapolis, Minnesota—submit the whole record in sufficient detail as would enable your office to make an independent evaluation. It is requested that you make a thorough examination of the cost and feasibility of each of the three transmission plans considered by the REA prior to its decision to make the loan to the East River Cooperative, and then submit your findings and evaluation to the Committee."

Comp. Report 41, infra, n. 28. The loan has been submitted for review to the Comptroller General and further study by the Administrator may yet be required. Ibid.

[22]This concession is undoubtedly reached from the teachings of *Kansas City Power & Light Co.* v. *McKay*, supra, at p. 931 and *REA* v. *Central Louisiana Electric Co.*, supra, at p. 865. In *Kansas City Power* case, at 931, the court said:

". . . The statutory scheme now before us clearly contemplates Congressional, rather than judicial, review of the governmental activities here in question, all of which are non-regulatory and which include disposal of surplus electric power turned over to the SPA by the Department of the Army. Congress has reserved for itself control over such activities through the power of making annual appropriations for the executive departments affected, and by providing specifically that the contingent fund created by Section 5 of the Flood Control Act of 1944, 16 U.S.C.A. §825s, may be expended only to the extent of annual appropriations for the purposes of the Act. The continuance of defendants' activities here complained of is therefore subject to review by Congress acting each year on the appropriations sought by the defendants. It is not—under the controlling precedents—subject to review by this court."

Likewise, the Administrative Procedure Act precludes judicial review where "agency action is by law committed to agency discretion." 5 U.S.C §1009.

It is clear that appellees are attacking "a step of a pending proceeding" leading to an ultimate decision not otherwise "judicially reviewable." *United States* v. *Los Angeles and S. L. R. Co.*, supra. Cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, at 112-3.[23]

Appellees submit that appellants' procedural efforts were arbitrary, capricious[24] and illegal.[25] Assuming they were, ap-

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[23]In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, the Supreme Court held that the provision of Civil Aeronautics Act authorizing judicial review of certain orders of the Board did not apply to decisions on applications for foreign air transportation since this was subject to Presidential approval. The court said:

> "Until the decision of the Board has Presidential approval, it grants no privilege and denies no right. It can give nothing and can take nothing away from the applicant or a competitor . . . Administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." 333 U.S. at 112-13.

[24]The mere allegation that administrative action is "arbitrary and capricious" is not controlling. These conclusory statements are further controlled by study of the agency involved and the conduct *factually* alleged in the complaint. See *Schilling* v. *Rogers*, 363 U.S. 666, at 676.

Assuming the present controversy was appropriate for judicial review, even on the abbreviated record before us appellees' position would be difficult to sustain under any standards suggested. Appellees insist that its case is not to influence the discretion of the Administrator but only to be given the right (1) to be advised, and (2) to have the Administrator endeavor to make the proposal reasonable. However, on the basis of the evidence and facts pleaded by appellees there is substantial evidence to support: (1) that the Administrator did advise appellees wherein their proposal was unreasonable (see ¶ E[3] of the complaint summary, supra, p. 6) 2 did endeavor to have the proposals made reasonable (see complaint and Exhibit O, supra, n. 4). The Administrator had the right to set a cut-off date (a little over a year after the first negotiations) for the appellees to submit their final proposal. The cut-off date is significant. The regulations allow for it in order to avoid delaying tactics. The Administrator is not required to negotiate thereafter. An administrative interpretation of a regulation is given great weight

pellees cannot succeed in doing indirectly that which they concede they cannot do directly, to-wit, enjoin the loan. Congress has steadfastly refused to provide judicial review under 7 U.S.C. §901 of the REA Act.[26] This silence could

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and will not be overturned by a court unless it is clearly unsupportable. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14; *Fred Wolferman, Inc.* v. *Gustafson*, 8 Cir. 1948, 169 F.2d 759, 763.

The Administrator's evaluation obviously involves weighing extrinsic factors in consideration of the loan *vis a vis* the proposals, such as higher investment costs, flexibility, future economy and cooperation of the parties. But justification of "unreasonableness" is not the issue before us. See *United States* v. *Carmack*, 329 U.S. 230, at 243-7; Cf. *Montana-Dakota Co.* v. *Public Service Co.*, 341 U.S. 246 at 251. If we recognize this as a reviewable area under the limited rights appellees claim, we would only inquire whether the procedural steps were taken.

[25]Analysis of *Alabama Power Company*, supra, forecloses consideration of plaintiffs' claim of illegality herein. The complaint in that case challenged the validity of a loan made by the Federal Emergency Administrator of Public Works to four municipal corporations for construction of an electricity-distribution system. Argument was submitted that loans were illegal because they were outside the statutory provisions. Mr. Justice Sutherland, speaking for the Supreme Court, said:

> "Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results, . . . considered a part, the lender owes the sufferer no enforceable duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any lawful way the borrower may choose." 302 U.S. 464, at 480.

[26]See, e.g., *Schilling* v. *Rogers*, 363 U.S. 666, at 674, where Justice Harlan said:

> "The point is that in this Act [Trading with the Enemy Act] Congress was inadvertent to the role of courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation . . . [citing *Work* v. *Rives*, 267 U.S. 175, 182]."

In 1962 and 1963 attempts were made to introduce bills into Congress amending the Rural Electrification Act to provide for public hearings and judicial review of orders approving loans. These bills were not reported out of committee. See Hearings on Food and Agriculture Act of

be premised on the concern that the private supplier could otherwise interfere with REA loans in each instance where the Administrator finds the public suppliers proposal unreasonable.

The studied expertise of the Administrator, the Comptroller General and Congress as to comparative cost studies, efficiency, flexibility and overall utility should remain in their capable hands and not the courts. The decisions entail engineering know-how and accounting procedures which the executive and legislative branches of government are better equipped to handle than the judiciary. The exercise of judgment by the Administrator, Congress or the Comptroller General invokes far more than performing a ministerial act. We are concerned with an area of the law "where generally the Executive and the legislature are supreme." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, *United States* v. *Carmack*, 329 U.S. 230, *United States* v. *Bush & Co.*, 310 U.S. 371, 380.[27] *United States* v. *Wiley Cove Ranch*, 8 Cir., 295 F.2d 436; *Duba* v. *Schuetzle*, 8 Cir., 303 F.2d 570; *Kansas City Power & Light Co.* v. *McKay*, supra; *REA* v. *Central Lousiana*

1962 before House Committee on Agriculture, 87th Cong., 1st Sess., pp. 680-681. See also H.R. 6852 and H.R. 7213, 88th Cong., 1st Sess.; Hearings before House Appropriations Committee on Department of Agriculture Appropriations for 1964, 88th Cong., 1st Sess., p. 374.

[27]Mr. Justice Douglas said:

> ". . . a change of rate . . . is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review." 310 U.S. at 380.

Electric Co., supra. The promulgation of the regulations in question unequivocally demonstrates that the Administrator relies upon Congressional guidance and sanction. Although we doubt that Congress and the Comptroller General will desire to review every loan made by the REA they do possess the machinery and the ability for review, as in the instant case, where the parties are in good faith in attempting to reach a meeting of the minds.[28] Under the facts presented here notwithstanding the regulations, the character of the agency action involved falls short of presenting a justiciable controversy.

The preliminary restraining order entered on June 27,

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[28]The Congressional referral to the Comptroller General to review the East River loan resulted in a recommendation that appellees' "joint plan" be further studied. See Comptroller General's Report to Agricultural Subcommittee of Senate Committee on Appropriations, *Examination into Alternative Transmission Plans Considered Prior to Approval of a Loan to East River Electric Power Cooperative, Inc., Madison, South Dakota*, at p. 3 (February 1966), Suppl. R. 165. The report discusses the merits of the "joint plan" in relation to those of the "independent plan." The Comptroller General supports the appellees' plan as one which would result in "greater economics to East River."

This report alone goes far to illustrate the administrative discretion involved in the consummation of REA loans, and buttresses the disrupting effect that judicial review would have upon the whole administrative process in this particular area. However, after the Senate Committee's referral to the Comptroller for study of the loan the REA made the first advance in funds to East River as of September 17, 1965. And despite the Comptroller's recommended restudy the REA had advanced funds under the loan to East River in the sum of $624,438.86 as of March 14, 1966. This occurred before the preliminary injunction of June 27, 1966. Hearings before the Agricultural Subcommittee of the Senate Committee on Appropriations, 89th Cong., 2nd Sess., H.R. 14596, pt. 2, p. 995. Whether such judgment and agency conduct is in the best interest of the objectives of the REA, particularly in light of the Comptroller General's Report of February 1966, recommending further study, is properly a Congressional concern and not ours. Certainly, the Congressional hearing and the Comptroller's report were intended for a purpose.

1966, should be dissolved by the District Court and the appellees' case dismissed for lack of jurisdiction.

Reversed in accordance with the opinion.

CONTINUATION OF APPENDIX A.

Judgment of The United States Court of Appeals for The Eighth Circuit

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Preliminary Restraining Order of the District Court entered June 27th, 1966, should be dissolved by the said District Court, and the plaintiffs'-appellees' case be dismissed for lack of jurisdiction.

And it is further Ordered and Adjudged by this Court that this cause be, and is hereby, reversed and remanded to the said District Court for proceedings consistent with the Opinion of this Court this day filed herein.

February 28, 1967.

Mandate stayed: April 4, 1967.

APPENDIX B

Opinion of United States District Court for The District of Minnesota

Memorandum and Order.

(Filed in U. S. District Court Dec. 31, 1965.)

* * * * *

In this action by two privately owned power companies against certain government officials, several motions pend. Plaintiffs, Northern States Power Co. (N. S. P.) and Otter Tail Power Co. (O. T. P.) move for a preliminary injunction. Defendants move for dismissal or in the alternative for summary judgment. A temporary restraining order issued on September 17, 1965 is extant.

Plaintiffs in this action seek to challenge a loan appproved by the R. E. A., pursuant to the Rural Electrification Act of 1936, 7 U. S. C. 901, *et seq.*, (R. E. Act), to the East River Electric Power Cooperative, Inc. (East River) on May 26, 1965, in the amount of $5,919,000. Plaintiffs claim the loan is illegal because consummated in violation of R. E. A. Bulletin 111-3, 29 Federal Register No. 40, pp. 2765-66, which allegedly establishes certain rights in favor of power suppliers such as N. S. P. and O. T. P. and imposes certain duties upon the R. E. A. and the Administrator.

The loan to East River consists of two portions: $4,027,000 to finance transmission facilities in South Dakota, and $1,892,000 to finance transmission facilities in Minnesota. N. S. P. and O. T. P. now serve as wheeling agents, or transmitters, of the power which East River, a super-coop, purchases from the Bureau of Reclamation and furnishes to its two Minnesota member cooperatives, Lyon-Lincoln

Electric Cooperative and Traverse Electric Cooperative, which in turn furnish electric power to consumers. With the loan East River would build its own transmission facilities in Minnesota duplicating to some extent the existing N. S. P. and O. T. P. facilities.

R. E. A. Bulletin 111-3 provides in part:

> Purpose. This notice sets forth REA policy with regard to power supply surveys and certificates thereto by the Administrator in relation to the approval of loans for generation or transmission facilities.
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> * * *
>
> . . . No loan for generation or transmission facilities will be made except . . . upon certification by the Administrator to the Secretary of Agriculture that the loan has been approved after the completion of a power supply survey which shows that the loan is . . . (c) needed because existing and proposed contracts to provide the proposed facilities or service to be financed were found to be unreasonable, each supplier involved was so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed supplier had failed or refused to do so within the time set by the Administrator.

29 Federal Register No. 40, pp. 2765-66.

East River applied to R. E. A. for the loan on May 26, 1964. The administrator, at about such time or prior thereto, undertook a two-part power survey, one part dealing with Minnesota and one part dealing with South Dakota. The survey began after the two newly-acquired Minnesota members of the East River System began receiving trans-

mission service from N.S.P. and O.T.P. under a 22-month contract negotiated between plaintiffs and East River.

The parties differ as to what constitutes the relevant history of the R. E. A. determination to grant the loan to East River. The plaintiffs note a conference on June 9 ,1964 among representatives of N. S. P., O. T. P., R. E. A. and East River as the first material attempt by the Administrator to institute negotiations for a long-term power supply arrangement between plaintiffs and East River. On the other hand, defendants point to correspondence and meetings long prior to the June, 1964 date as being negotiations relevant to the eventual granting of the loan and rejection of plaintiffs' proposals. Plaintiffs characterize plans submitted by plaintiffs and considered by East River in June and July of 1964 as working drafts of possible arrangements to obviate the need for an R. E. A. loan while the R. E. A., the Administrator, and East River apparently viewed such drafts as final proposals.

On August 3, 1964 the R. E. A. informed plaintiffs by letter of certain basic requirements which any acceptable joint plan proposal must meet. It was suggested that East River would build, with R. E. A. aid, certain facilities which N. S. P. and O. T. P. would use in exchange for the use by East River of certain presently existing facilities of the plaintiffs. Straight-wheeling arrangements, under which plaintiffs would transmit power to East River's Minnesota members for a charge rather than in exchange for the use of East River facilities, were also considered. The R. E. A. eventually concluded that plaintiffs' proposals were unreasonable and so informed them.

During September 21-24, 1964, further negotiations took place in the R. E. A. offices in Washington, D. C. with

representatives of all parties in attendance. Following this meeting N. S. P. and O. T. P. submitted another proposal on October 2, 1964. Plaintiffs characterize this proposal as "definite" while defendants characterize it as "final".

Further negotiations concerning the approval or disapproval of plaintiffs' last proposal ceased until May 17, 1965 when the R. E. A. informed N. S. P. and O. T. P. that the plan was unreasonable and unsatisfactory. On May 26, 1965 the Administrator approved the loan to East River.

Beyond this skeleton view of the negotiations prior to the granting of the loan, substantial dispute exists among the parties as to the significance of various meetings and correspondence, the nature of various proposals, the effect of various dates and deadlines, and the meaning and intent of various communications among the parties. In addition defendants allege dilatory and insufficient action on the part of plaintiffs in the submission of proposals while plaintiffs allege dilatory and insufficient action by defendants in considering proposals and otherwise acting in conformity with the requirements of Bulletin 111-3.

Plaintiffs' basis for this motion for a preliminary injunction as well as for the relief requested in the main action, is the alleged failure of the R. E. A. to follow the procedural steps contained in Bulletin 111-3. Specifically, plaintiffs allege a fulfillment in the plaintiffs' proposal of October 2, 1964 of the R. E. A.'s basic requirements set forth in the letter of August 3, 1964. Further, plaintiffs allege the failure of the R. E. A. between October 2, 1964 and May 17, 1965, the date of the Administrator's rejection of plaintiffs' last proposal, to inform plaintiffs wherein the proposal was unreasonable or to make any attempt to have the proposal

made reasonable. Also plaintiffs allege that the letter of May 17, 1965 rejecting the proposal does not sufficiently inform plaintiffs of the unreasonableness of the proposal and no opportunity has since been given to attempt to make the proposal reasonable. Plaintiffs contend the R. E. A. has acted in violation of Bulletin 111-3, which plaintiffs claim is a duly promulgated administrative regulation having the force and effect of law and binding on the R. E. A. and the Admiministrator. Further, such actions are alleged to be arbitrary and capricious in violation of the rights of plaintiffs.

Plaintiffs assert several grounds for jurisdiction and venue; 28 U. S. C. A. 1361, granting district courts original jurisdiction in actions in nature of mandamus; 5 U. S. C. A. 1009, § 10 (a) of the Administrative Procedure Act, granting judicial review of administrative action in certain situations; 28 U. S. C. A. 2201, dealing with declaratory judgments; 28 U. S. C. A. 1331, granting original jurisdiction to district courts when the matter in controversy exceeds the value of $10,000 and arises under the Constitution, laws or treaties of the United States; and 28 U. S. C. A. 1391, concerning venue in cases where each defendant is an employee or officer of the federal government acting in his official capacity.

Defendants, in addition to opposing the granting of a preliminary injunction, move for dismissal or for summary judgment. Defendants urge primarily the grounds that plaintiffs lack standing to sue, that the action constitutes an unconsented suit against the United States, and that the subject matter of the R. E. A. Act has been committed to the unreviewable discretion of the Administrator and is, therefore, not judicially reviewable. These three negative

contentions viewed affirmatively constitute the single issue of whether plaintiffs have any judicially enforceable and reviewable legal right in this situation.

Defendants rely on a line of cases denying standing to similar plaintiffs on the ground that mere economic competition, which is in itself lawful, created as the result of government action, grants no standing to persons in circumstances similar to the plaintiffs in this action. Defendants further assert in this regard that R. E. A. Bulletin 111-3 is merely a notice or a policy statement and not a duly promulgated regulation having the force and effect of law and, therefore, establishes no legal rights in favor of persons such as the plaintiffs here.

In support of their motion for summary judgment defendants allege, beyond the above contentions as to standing, that no genuine issue of material fact remains for determination at trial and they are, therefore, entitled to judgment as a matter of law. Defendants thus maintain that on the undisputed facts of this case the procedure of the R. E. A. was lawful in all respects and fully in compliance with the procedure outlined in Bulletin 111-3. In this connection defendants recite an abundant list of correspondence, meetings and other communications, studies and events which they urge establish the facts of the requisite power study, consideration of plaintiffs' proposals, findings of unreasonableness, advisement of and attempts to correct such unreasonableness, the establishment of a final cut-off date for negotiations, consideration of plaintiffs' final proposal, and an eventual final finding of plaintiffs' proposal being unreasonable. Such procedures prior to the granting of the loan constitute the basis of defendants' allegations of compliance with Bulletin 111-3 and otherwise lawful action entitling them to summary judgment.

Defendants' major contention urged at the hearing on these motions is plaintiffs' lack of standing to test judicially the R. E. A.'s action. In the resolution of this issue, particularly, the precise basis of plaintiffs' cause of action is significant. Plaintiffs assert no right to challenge the authority of the R. E. A. to grant loans or for that matter to grant the loan in question here; neither do plaintiffs claim that the competition of the R. E. A. financed facilities grants standing to challenge the loan. Rather plaintiffs claim R. E. A. Bulletin 111-3 is a duly promulgated regulation having the force and effect of law and binding upon the R. E. A. and the Administrator, and that a loan approved without adherence to it invades the plaintiffs' rights and entitles them to judicial review of the agency action.

Defendants rely primarily on the case of *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (D. C. Cir.), *cert. denied,* 350 U. S. 884 (1955), and other cases of similar import both before and after the *Kansas City* case. In that case the plaintiff sought to challenge a loan granted by the R .E. A. Citing *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938), the Court in the *Kansas City* case held the sole interest of the plaintiff in eliminating legal economic competition grants no standing to sue. The plaintiff in the Kansas City case claimed nothing in the way of having to abandon activities or forego any planned expansion or any illegalities by the R. E. A. or other interested parties.

The court further stated that the R. E. Act and the Flood Control Act contain no provision for judicial review of agency action, as some statutes do, but only provided for congressional review and control through the power of annual appropriations. Likewise, the court found plaintiff had no standing under the more general purview of § 10 (a) of

the Administrative Procedure Act since plaintiff suffered no "legal wrong" nor was adversely affected or aggrieved by any agency action within the meaning of any relevant statute.

The *Alabama Power Co.* case, *supra,* also similar to the present case, makes the analogy between agency action giving rise to economic competition and private action resulting in competition. For example, if a corporation made an ultra vires loan to a power supplier effecting competition with an existing power supplier, the latter person would have no standing to challenge the legality of the loan merely because it suffered economic competition when such competition was in itself legal.

Other cases of similar import are *Tennessee Elec. Power Co.* v. *T.V.A.*, 306 U. S. 118 (1938), and *Duke Power Co.* v. *Greenwood,* 302 U. S. 485 (1938) and more recently, *Alabama Power Co* v. *Alabama Elec. Cooperative, Docket* No. Civ. 2193-N (Mid. D. Ala. N. D., July 13, 1965).

Instances of a lack of standing for judicial review of agency action when the sole injury of economic competition is alleged are not unusual and certainly not limited to R. E. A. activities nor factual settings such as arose in the above cited cases or the present action. For example, in *Texas State AFL-CIO* v. *Kennedy,* 330 F. 2d 217 (D. C. Cir. 1964), the plaintiff complained that the government was illegally allowing alien commuters into this country to work, presumably impinging on the work supply available to plaintiff's members. The court stated that Congress had given no standing to the plaintiff either expressed or implied in any statute, and, therefore, plaintiff had none when the only complaint or injury was mere economic competition made possible by government action, even if such action be

illegal. In *Pennsylvania R. Co.* v. *Dillon*, 335 F. 2d 292 (D. C. Cir. 1964), the court followed the same reasoning in determining that shippers have no legally protected right to be free of competition, in the absence of statutory aid, and hence no standing on the basis of mere economic competition, to challenge the documentation by the Commissioner of Customs of certain vessels, even if such documentation was illegal. Likewise in *Berry* v. *Housing and Home Financing Agency*, 340 F. 2d 929 (2nd Cir. 1965), and *Taft Hotel Ass'n* v. *HHFA*, 262 F. 2d 307 (2nd Cir. 1958), plaintiffs were denied standing on the basis of economic loss stemming from lawful competition made possible through federal aid.

The insistence of the courts in denying standing based upon legal economic competition established by government action, while firm within certain limits, by no means precludes standing when some legal wrong is present. The most recent and most similar example is the case of *Central Louisiana Elec. Co.* v. *R. E. A.*, 236 F. Supp. 271 (W D. La. 1964) (now on appeal). The situation in this case closely paralleled the facts of the instant case. The court there agrees with the *Kansas City*, *Alabama Power* and *Tennessee Power* cases, *supra*, that the plaintiff power supplier would have no standing if the only basis of complaint was economic injury due to the establishment of lawful competition. However, the court found more in this case, evidence of a conspiracy between the R. E. A., the super cooperative and the member cooperatives to obliterate the business of the plaintiff. Such a situation gave standing to the plaintiff and a preliminary injunction issued. Similarly the case of *Kentucky Utilities Co* v. *T. V. A.*, 237 F. Supp. 512 (E. D. Tenn. 1964), granted standing to challenge agency

action because the finding of a conspiracy caused the competition itself to be illegal. The dissent of Judges Prettyman in the *Kansas City* case, *supra,* is to a like effect. Cf., Justice Butler, dissenting in the *Tennessee Elec. Power Co.* case, *supra,* stating a constitutional ground for standing in the event agency action invaded property rights or destroyed property, whether or not authorized by statute, if possible violations of due process were involved.

Analogous decisions in other areas of administrative action have allowed standing when an injury was beyond mere lawful economic competition. In *Whitney National Bank* v. *Bank of New Orleans & Trust Co.,* 323 F. 2d 290 (D. C. Cir. 1963), plaintiff had standing to challenge the charter of a competitor bank in a location prohibited by statute and, therefore, evidencing an unlawful act by the government giving rise to unlawful competition. In *Gonzalez* v. *Freeman,* 334 F. 2d 570 (D. C. Cir. 1964), involving the disbarment of a contractor from participation in government contracts, the court granted standing on the claim of arbitrary or unfair government action either substantively or procedurally, although the court stated that plaintiff had no legal right to be granted government contracts.

By way of summary, therefore, the law denies standing to plaintiffs such as N. S. P. and O. T. P. if the only injury complained of lies in the economic loss caused by the competition, lawful in itself. On the other hand, if plaintiffs' claim is of unlawful competition or the invasion of some legal right, standing exists for a judicial determination of whether plaintiffs have suffered a legal wrong.

As stated earlier, plaintiffs' complaint does not deal with the authority of the R. E. A. to ultimately grant a loan establishing competition with N. S. P. and O. T. P., nor any

right to be free of competition from East River and other cooperatives. Rather plaintiffs seek judicial protection of rights allegedly established in their favor in R. E. A. Bulletin 111-3. In this posture, then, plaintiffs' right to judicial review rests on the legal stature of the Bulletin.

R. E. A. Bulletin 111-3 appears in 29 Federal Register No. 40, pp. 2765-66. No indication appears in the Bulletin itself, or anywhere else, that it was meant to be anything but a statement of R. E. A. rules of general applicability and legal effect and published in accordance with the Federal Register Act, 44 U. S. C. 301, *et seq.* Such rules so promulgated have the force and effect of statute or law and are binding on those persons publishing them as well as on the general public, until such time as they be repealed or modified. *Sheridan-Wyoming Coal Co.* v. *King,* 172 F. 2d 282 (D. C. Cir. 1949), reversed on other grounds, *sub nom. Chapman* v. *Sheridan-Wyoming Coal Co.,* 338 U. S. 621 (1950) (deals with regulations of the Secretary of the Interior); *Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954) (deals with regulations of the Attorney General); *United States* v. *Perkins,* 79 F. 2d 533 (2nd Cir. 1935) (deals with rules of the Department of Labor). This binding force and effect of statute or law attaches to duly promulgated regulations whether or not the person or body publishing them was under any obligation to impose the duties or restrictions upon himself or others. *Service* v. *Dulles,* 354 U. S. 363 (1957).

But defendants contend that Bulletin 111-3 is merely a statement or notice of policy made at the request of a congressional committee and meant primarily to communicate internal procedures to that committee and not to carry any general applicability and legal effect such as would impose

duties upon the R. E. A. or the Administrator or establish legal rights in favor of power suppliers such as N. S. P. and O. T. P. The case of *Central Louisiana Elec. Co. v. R. E. A., supra,* affords some support for this view. The district court in Louisiana there stated, in dictum and without discussion of the point, that Bulletin 111-3 does not have the force and effect of law but merely delineates R. E. A. policy in this area.

In spite of this judicial observation and defendants' contentions, several considerations indicate the propriety of a contrary conclusion. Whatever may have been the intent of those publishing the Bulletin, it would appear to constitute a duly promulgated regulation enacted within the legal authority of the R. E. A. resulting in a pronouncement having the force and effect of law.

A reading of the Federal Register Act, 44 U. S. C. 301 *et seq.*, lends support to this conclusion. Section 304 defines "document" to be published in the Federal Register as including any "order, regulation, rule * * *" issued by a Federal Agency and Section 305 prohibits the publication in the Federal Register of "comments or news items of any character".

The policy reasons why administrative agencies, or any other authority, must maintain adherence to known procedures and rules are well known and long established, and strongly support the plaintiffs' suggested construction of Bulletin 111-3. The public has a right to know what treatment to expect both substantively and procedurally from its government and should not be subject to the shifting whims of a government administrator. *Germania Iron Co.* v. *James,* 89 Fed. 811 (8th Cir. 1898).

With this policy and the above quoted language of the

Federal Register Act in mind, it is logical to view R. E. A. Bulletin 111-3 as a duly promulgated regulation having binding effect. Publication in the Federal Register naturally implies to plaintiffs and the public in general something more than a mere statement of internal agency affairs not affecting the public. If the burden is on anyone to communicate clearly some other intent in the publication of a statement in the Federal Register, it must be with those making the publication. Plaintiffs were entitled to rely on Bulletin 111-3 as being a regulation having the force and effect of statute or law, and to consider adherence thereto by the R.E.A. as a legal right in their favor.

The statements of the committee requesting the issuance of Bulletin 111-3 further identifies its stature as a binding regulation imposing duties upon the R. E. A. and the Administrator. Senator Holland of the Senate Committee on Appropriation submitted a report in the 89th Congress, 1st Session, to accompany H. R. 8370, which made appropriations for the Department of Agriculture and related agencies for the fiscal year ending June 30, 1966. This report refers to Report No. 497, 88th Congress, 1st Session, made by this committee in conjunction with the house committee. In the words of Senator Holland the committee at that time

> imposed certain *duties* and responsibilities upon the REA Administrator to its borrowers and their *power suppliers* to be complied with before approving loans for generation and transmission facilities.
>
> The committee directs the REA Administrator's attention to this action and the *regulations* promulgated thereunder. . . . [Emphasis added.]

R. E. A. Bulletin 111-3 followed and was apparently prompted by the committee's action. The quoted passages reveal explicitly and unequivocally the committee's understanding of the nature and effect of Bulletin 111-3. The clear import is that duly promulgated regulations were to issue from the R. E. A. with the character accorded them by law, namely the full, binding force and effect of statute.

The argument of the R. E. A. Administrator (and the other defendants) that Bulletin 111-3 was a mere policy declaration and no more than that, is fatuous. The practical realities of the situation appear to be that the Administrator wanted to satisfy the wishes of the powerful Appropriation Committees of the Congress in order to insure a favorable recommendation from them for funds, but at the same time apparently did not want to tie his own hands as to the expenditure of those funds—and hence his urging here that Bulletin 111-3 is "simply an announcement of certain procedures in connection with loans." But the Administrator is inconsistent. There is no legal support for his having a special "understanding" with a Congressional Committee with reference to public funds which is not binding on him and the public. He wants to run with the hares and hold with the hounds. He secured the funds on representations made to the Congress in apparent good faith and sanctified them by the promulgation of a regulation in the Federal Register. It was relied upon by the public. Now he, like everyone else, must follow his own regulation.

And so, judicial review is available to plaintiffs on the allegation that the R. E. A. has not complied with the procedures contained in Bulletin 111-3 in the granting of the loan to East River. Section 10 (a) of the Administrative Procedure Act, 5 U. S. C. 1009, provides for this review for persons suffering legal wrong because of agency action.

Section 10 (a) is not new law and in fact incorporates the law of such cases as the *Alabama Power* case, *supra*. The Administrative Procedure Act merely clarifies the already existing right to judicial review if administrative action invades a person's legal right, as opposed to an interest of the public generally. *Duba* v. *Schuetzle*, 303 F. 2d 570 (8th Cir. 1962). The conclusion that Bulletin 111-3 has the force and effect of statute clearly brings these plaintiffs within the purview of § 10 (a) as persons suffering a legal wrong on account of defendants' action or adversely affected or aggrieved by such action within the meaning of any relevant statute. Even the *Kansas City* case, *supra*, which defendants rely on so heavily recognizes appropriate judicial review of agency action if such action has disregarded some legal right, even beyond the strict scope of § 10 (a) of the Administrative Procedure Act, *i. e.*, "within the meaning of any relevant statute".

Plaintiffs' right to judicial review is not precluded here, as is possible in some instances, by either a statute specifically precluding judicial review of agency action or the activities in question being committed to the sole discretion of the R. E. A. and the Administrator. See *Gonzalez* v. *Freeman, supra*. Jurisdiction under § 10 (a) need not be specifically provided for in a statute but only must be not specifically precluded. Judicial review is neither expressly nor impliedly prohibited in the R. E. Act. The only provisions of the R. E. Act tending to rest sole discretion in the Administrator or sole review in Congress rather than in the courts are 7 U. S. C. 908, 909, 910, dealing with peripheral matters such as the discharge of personnel, prohibitions on partisan based action, and the submission of an annual report to Congress. None of these matters bear on the issues

of this case and no other provision of the R. E. Act expressly or impliedly commits matters to the unreviewable discretion of the Administrator.

Defendants also seek dimissal by characterizing this action as an unconsented suit against a sovereign. In addition to the preceding discussion establishing plaintiffs' right to judicial review,one further observation is pertinent in connection with this allegation. A clearly established exception to the normal rule of sovereign immunity is the allegation that actions by officials exceeded statutory powers. The limiting statutory effect of Bulletin 111-3 and plaintiffs' claims of disregard by the R. E. A. and the administrator of such limitations clearly brings this case within the exception to the normal sovereign immunity rule, if it is applicable in any event to this case. See *Central Louisiana Elec. Co.* v. *R. E. A., supra,* at 280 and the authorities cited therein.

Defendants also move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The grant of such a motion rests, of course, on the question of whether or not any genuine issue of material fact remains for determination at trial. Much of the objective evidence in this case is indisputable, *i. e.,* the dates and contents of numerous letters and other communications, reports, proposals, events, etc. On the other hand, numerous genuine issues of fact remain in such areas as the intent and understanding of the parties as to the stage of negotiations and the significance of various dates, events, proposals, etc. These are necessary and material facts bearing on such questions as the reasonableness of the actions and decisions involved in this case and must await determination at trial. Summary judgment is not an appropriate remedy in this action.

Plaintiffs have moved for a preliminary injunction.

Even assuming that upon a final resolution of this case plaintiffs would be entitled to injunctive relief, the factors necessary to the granting of preliminary relief now have not been shown. There has been no showing by the plaintiffs of a reasonable certainty of success at trial or of irreparable injury if the preliminary injunction is denied. Generally the court in the exercise of its discretion in this area must balance the convenience of the parties and the possible injuries which may follow the granting or withholding of injunctive relief. *3 Barron & Holtzoff, Federal Practice and Procedure,* § 1433 at 490-495 (Wright ed., 1958).

In contrast to plaintiffs' allegations concerning disregard of the procedural requirements of Bulletin 111-3, considerable evidence indicates that defendants have indeed proceeded in accordance with the regulations. At this stage of the proceedings plaintiffs have not established the requisite reasonable certainty or substantial likelihood of success on the merits so as to justify preliminary injunctive relief.

Although a preliminary injunction would maintain the status quo, no showing of irreparable harm is manifest. Plaintiffs will not be deprived of their property before a determination on the merits. In the event they ultimately succeed in the action it is doubtful that irreparable harm will have befallen them in the interim. Further, while the public interest in preventing waste or misuse of public funds is an important consideration, such interest is overbalanced, in the absence of the reasonable certainty of success by plaintiffs on the merits, by the need for public agencies such as the R. E. A. to carry out their functions.

Defendants' motions for dismissal or for summary judg-

ment, and plaintiffs' motion for preliminary injunction are denied. The temporary restraining order of September 17, 1965, is vacated.

Dated: December 31, 1965.

s/ EDWARD T. DEVITT,
Chief Judge,
United States District Court,
District of Minnesota.

APPENDIX C

Opinion and Order Granting Preliminary Injunction and Preliminary Injunction of the United States District Court for the District of Minnesota

The above captioned matter came on for hearing on June 21, 1966, pursuant to a motion by plaintiffs for a preliminary injunction to continue until final determination of this action. Messrs. Kenneth W. Green, Joe A. Walters, Cyrus A. Field and Arland D. Brusvan appeared for the plaintiffs in support of their motion. Mr. Robert J. Wieferich of the Department of Justice appeared for defendants in opposition thereto.

Plaintiffs initiated this action on August 12, 1965, asserting several grounds for jurisdiction and venue; 28 USCA 1361, granting district courts original jurisdiction in actions and nature mandamus; 5 USCA 1009, Sec. 10 (a) of the Administrative Procedure Act, granting judicial review of administrative action in certain situations; 28 USCA 2201, dealing with declaratory judgments; 28 USCA 1331, granting original jurisdiction to district courts when the matter in controversy exceeds the value of $10,000.00 and arises under the Constitution, laws or treaties of the United States; and 28 USCA 1391, concerning venue in cases where each defendant is an employee or officer of the Federal Government acting in his official capacity.

By their complaint plaintiffs seek to challenge a loan approved by the REA, pursuant to the Rural Electrification Act of 1936, 7 USC 901, et seq., to the East River Electric Power Cooperative, Inc. on May 26, 1965, in the amount of $5,919,000.00. Plaintiffs claim the loan is illegal because consummated in violation of REA Bulletin

111-3, 29 Federal Register No. 40, pages 2765-66, which establishes certain rights in favor of power suppliers such as plaintiffs and imposes certain duties upon the REA and its Adminstrator. At the commencement of this litigation plaintiffs moved for a preliminary injunction and shortly thereafter defendants moved for a dismissal of this action or, in the alternative, for summary judgment.

On December 31, 1965, this Court entered its memorandum and order whereby, among other things, defendants' motion for dismissal or for summary judgment and plaintiffs' motion for preliminary injunction were denied. See 248 F. Supp. 616.

A review of the record on file in the office of the clerk of this Court indicates, among other things:

(a) On January 19, 1966, this Court denied defendants' motion for a dismissal of this action, or in the alternative for a modification of this Court's order of December 31, 1965, and directed that all parties may proceed to take depositions and pursue discovery proceedings in accordance with the Federal Rules of Civil Procedure;

(b) On January 19, 1966, plaintiffs moved this Court for an order requiring defendants to produce certain documents in their possession and permit plaintiffs to inspect and copy the same preliminary to the taking of certain depositions (which depositions were also noticed on January 19, 1966, for oral examination on February 22, 1966) by oral examination of defendants and certain of their employees and agents at a time shortly after plaintiffs had an opportunity to inspect and copy said documents;

(c) On January 25, 1966, defendants served their answer to plaintiffs' complaint;

(d) On January 28, 1966, plaintiffs filed a notice of trial of this litigation to be tried as a court case at the general term of this Court commencing March 1, 1966;

(e) On February 15, 1966, defendants opposed plaintiffs' motion as to certain documentation on the grounds of failure of good cause being shown and said documentation being irrelevant and immaterial;

(f) By order dated February 15, 1966, this Court granted plaintiffs' motion for the production, inspection and copying of certain documents with inspection to commence in Washington, D. C. on March 7, 1966;

(g) On March 2, 1966, defendants moved this Court for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure based upon claims of privilege;[1]

(h) On April 5, 1966, defendants presented to this Court a copy of a report dated February 10, 1966, of the Comptroller General of the United States of "Examination into Alternative Transmission Plans

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[1]Defendants' claims of privilege relate to two groups of documents, the first of which generally consist of memorandum, letters, reports and other communications between and among various employees and officials within the Department of Agriculture and the Rural Electrification Administration; the second group of documents consist almost entirely of communications between the Government and the East River Electric Power Cooperative, Inc. and further intra-governmental communications.

Considered Prior to Approval of a Loan to East River Electric Power Cooperative, Inc.";

(i) On May 5, 1966, trials of non-jury cases were commenced that had been regularly placed upon the spring general term calendar of this Court and the trials of said non-jury cases as well as jury cases placed upon said general term calendar are substantially completed;

(j) On May 12, 1966, this Court ruled on defendants' motion for a protective order and in essence withheld final determination of defendants' claims of privilege pending an *in camera* inspection by this Court of the documentation in question; defendants were granted fifteen days to produce the documents for *in camera* inspection;

(k) On May 20, 1966, defendants, without requesting a stay of this Court's order for *in camera* inspection, noticed a further motion returnable on June 13, 1966, to modify the previous order of this Court for *in camera* inspection by adding language which would in substance require this Court to return the documents which would be produced by defendants for *in camera* inspection directly to the defendants prior to this Court's ruling thereon;

(l) At the hearing on June 13, 1966, this Court denied defendants' motion to modify its previous order requiring *in camera* inspection;

(m) On June 16, 1966, defendants filed with this Court a formal written statement declining to produce the withheld documents for *in camera* inspection.

As this Court reads the complaint which initiated this action and various affidavits filed in support of plaintiffs' position, the plaintiffs assert no right to challenge the authority of the REA to grant loans or for that matter to grant the loan in question. Rather, plaintiffs claim REA Bulletin 111-3 is a duly promulgated regulation having the force and effect of law and binding upon the REA and the administrator and that a loan approved without adherence to it invades the plaintiffs' rights and entitles them to judicial review of the agency action.

This Court previously concluded that judicial review is available to plaintiffs on the allegation that the REA has not complied with the procedures contained in its Bulletin 111-3. Plaintiffs contend that the documentation withheld by defendants reflects the procedures followed in the determination to grant the loan to East River Electric Power Cooperative, Inc. and that such procedures did not follow the legal requirements for granting such a loan. No alternate sources of the information which plaintiffs seek has been suggested to this Court by the defendants and this Court finds that the kind of information contained in the documentation to which defendants have asserted a claim of privilege is not otherwise available to the plaintiffs.

In this posture of the litigation the Court believes that the documentation withheld by the defendants from this Court's *in camera* inspection preliminary to a ruling on the adequacy of claims of privilege may, and upon inspection by this Court it may not, be absolutely essential to be produced for inspection if the litigants are to secure a just determination of their respective claims. The thwarting of a determination by this Court of claims of privilege of such

documentation will necessarily result in delays in preparation for trial and the trial of the action itself.

At the time of this Court's order of December 31, 1965, denying defendants' motion to dismiss, it was contemplated that this litigation would quickly move forward by way of discovery proceedings so as to permit an adjudication on the merits at the spring 1966 general term of this Court which is now practically concluded. The Court finds that plaintiffs and their counsel have been diligent in attempting to bring this litigation to a final conclusion. Plaintiffs promptly placed this case on the general term calendar commencing March 1, 1966 and immediately proceeded to invoke discovery proceedings under the Federal Rules of Civil Procedure as an aid to preparation for trial. It is apparent that defendants' refusal to produce the documentation in question for this Court's *in camera* inspection preliminary to a ruling on claims of privilege is going to prevent this litigation soon being brought on for trial or, if brought on for trial, a determination of the issues without considerable delays occasioned by requests and refusals over documentation which in and of itself may be determinative of the issues presented to this Court for final determination.

This Court expressed the opinion, at the time of its order of December 31, 1965, that plaintiffs at this stage of the proceedings had not demonstrated sufficient likelihood of success on the merits so as to justify preliminary injunctive relief. Further, anticipating early trial no showing of irreparable harm was manifest. Defendants' conduct has made an early trial impossible. Such conduct will frustrate a just determination of this litigation and its final disposition from this Court's calendar.

This Court finds that the intentional and wilful refusal of the defendants to produce the documents in question for an *in camera* inspection preliminary to a ruling on claims of privilege indicates that the documents would prove, or help to prove, the basic and essential facts supporting plaintiffs' claim for relief as alleged in their complaint. Such a finding is supported by the report dated February 10, 1966, of the Comptroller General of the United States in which the Comptroller General stated as an overall conclusion:

> "On the basis of our review of the cost and feasibility of the straight-wheeling, joint, and independent transmission plans considered by REA prior to its approval of the independent plan, we believe that, solely on the basis of the foreseeable benefits of the joint plan—that is, estimated savings of $647,000 of investments over a longer period of time and estimated savings of $138,000 in costs of operation during a 10-year period—adoption of the joint plan would have resulted in greater economies to East River than would the adoption of the independent plan. In addition, REA considered the joint plan to offer a more reliable system than the independent plan offered.
>
> "We note that, in approving the independent plan, REA cited certain possibilities for achieving economics under this plan which might offset the foreseeable benefits of the joint plan. The Administrator stated that, while no one of the factors, as discussed in this report, when considered separately, might have resulted in the approval of the independent plan, the

combination of these factors would justify approval of the independent plan.

"We believe that REA did not fully explore the possibilities discussed in this report in order to ascertain their likelihood of occurring and the resultant effect on the alternative plans. To what extent the results of further exploration might have affected REA's decision to approve the independent plan cannot be measured as of the time of loan approval; nor is it evident, as of December 31, 1965, that developments subsequent to the loan approval have either confirmed or disproved that such possibilities will materialize."

At this stage of the proceedings and based upon the entire record now before me, including affidavits on file and the Comptroller General's Report submitted by the defendants, this Court finds and concludes that there has been a prima facie showing of non-compliance with the applicable regulations; that the defendants' conduct lends further support to this finding and conclusion. Upon the entire record the Court accordingly finds and concludes that there is sufficient factual showing and sufficient likelihood of success by the plaintiffs on the merits so as to justify preliminary injunctive relief; that the maintenance of a status quo pending final disposition of this litigation is necessary so as not to render the substantive issues moot; that plaintiffs will suffer irreparable harm by the delays that have now become apparent and that without injunctive relief plaintiffs may be deprived of their justicible rights before a final determination on the merits. Accordingly, the requisite factual showing for preliminary injunc-

tive relief, as prayed for in plaintiffs' motion, is now apparent.

Independently of the foregoing, the facts which have been designated as established for purposes of this case by separate order of this Court relating to sanctions under Rule 37 would alone require temporary injunctive relief.

Therefore, it is:

Ordered, That plaintiffs' motion for a preliminary injunction in the above captioned action to continue until the final determination thereof be, and it hereby is, granted;

Ordered Further, That, pending further order of this Court, the above named defendants, and each of them, and all other persons who are or may be under the control of them, or either of them, and all persons to whom knowledge of such injunction shall come be, and they hereby are, restrained and enjoined from (i) consummating or participating in consummation of that certain loan to East River Electric Power Cooperative, Inc. in the amount of $5,919,000.00 under the provisions of the rural electrification act of 1936, as amended, and (ii) distributing, expending or using any of the proceeds of the said loan approved by the Rural Electrification Administration on or about May 26, 1965, pursuant to an application by East River Electric Power Cooperative, Inc. filed on or about May 26, 1964.

Ordered Further, That the injunction bond of the plaintiffs in the amount of $1,000.00 approved as to form and surety by order of this Court dated June 21, 1966, and filed in the office of the clerk of the above named Court on June 22, 1966, stand as the bond relating to this injunction.

It Is So Ordered.

Dated at Minneapolis, Minnesota this 27th day of June, 1966.

/s/ EDWARD J. DEVITT,
Chief Judge.

APPENDIX D

Article III, Section 1, to the United States Constitution

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

* * * * *

28 U.S.C. § 1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub. L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.

* * * * *

28 U.S.C. § 2201. Declaratory Judgment Act.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63

Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349.

* * * * *

SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other

adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorai or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlaw-

fully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243; 5 U.S.C. 1009.

* * * * *

28 U.S.C. § 1331. Federal question.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub. L. 85-554, § 1, 72 Stat. 415.

* * * * *

28 U.S.C. § 1391. Venue generally

* * * * *

(e) A civil action in which each defendant is an officer or employee of the United States or any agency

thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought. As amended Oct. 5, 1962, Pub.L. 87-748, §2, 76 Stat. 744; Dec. 23, 1963, Pub.L. 88-234, 77 Stat. 473.

* * * * *

Section Two of the Rural Electrification Act

The Administrator is authorized and empowered to make loans in the several States and Territories of the United States for rural electrification and the furnishing of electric energy to persons in rural areas who are not receiving central station service and for the purpose of furnishing and improving telephone service in rural areas as hereinafter provided; to make, or cause to be made, studies, investigations, and reports concerning the condition and progress of the electrification of and the furnishing of adequate telephone service in rural areas in the several States and Territories; and to publish and disseminate information with respect thereto. May 20, 1936, c. 432, Title I, §2, 49 Stat. 1363; Oct. 28, 1949, §§ 2, 3, 63 Stat. 948; 7 U.S.C. 902.

* * * * *

Section Four of the Rural Electrification Act

The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: *Provided,* That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine

and may be made payable in whole or in part out of the income: *Provided, further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further,* That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed. May 20, 1936, c. 432, Title I, § 4, 49 Stat. 1365; Sept. 21, 1944, c. 412, Title V, §§ 502(a), 503, 58 Stat. 739; Dec. 23, 1944, c. 725, 58 Stat. 925; June 29, 1948, c. 703, 62 Stat. 1070; Oct. 28, 1949, c. 776, §§ 2, 4(e), 63 Stat. 948; June 15, 1955, c. 139, § 2, 69 Stat. 132; 7 U.S.C. 904.

* * * * *

REA BULLETIN 111-3. 29 FED. REG. 2765 (1964):

UNITED STATES DEPARTMENT OF AGRICULTURE

Rural Electrification Administration

February 24, 1964

REA BULLETIN 111-3

SUBJECT: Power Supply Surveys

I. Purpose: This bulletin sets forth REA policy with regard to power supply surveys and certifications thereto by the Admiministrator in relation to the approval of loans for generation or transmission facilities.

II. General: The terms and conditions of power supply arrangements are major and critical factors in the ability of REA borrowers to carry forward the rural electrification program. REA has the responsibility to assist borrowers in achieving the most advantageous power supply arrangements to accomplish the objectives of the Rural Electrification Act and, without prejudice to the accomplishment of these objectives, to conserve REA loan funds. REA will undertake power supply surveys to assure adequate review of existing and proposed power supply alternatives and to encourage closer cooperation between REA borrowers and other electric power suppliers.

III. Policy:

A. Requests for Power Supply Surveys: Any REA borrower or potential borrower may request REA to make a survey of any specific power supply problem or its power supply needs. Such request shall provide a full description of existing power supply contracts

and arrangements, a statement of any special problems and a general summary of power supply needs, copies of any proposals made by existing or other suppliers, and a summary of negotiations pertaining to current or anticipated problems and needs. Distribution-type systems should submit such request and information to the area office; power-type systems should submit such request and information to the Power Supply Division.

B. Conduct of Survey: If the Administrator determines to undertake the requested power supply survey, the survey shall be so conducted as to provide an adequate review of the applicant's power supply problems and needs, existing or proposed power supply arrangements, if any, and such other potential power supply arrangements which, in the judgment of the Administrator, may contribute to the solution of those problems and needs. Where the Administrator finds existing or proposed contracts with power suppliers are unreasonable for purposes of the Rural Electrification Act, the supplier under such contracts or proposals will be advised wherein they are unreasonable, and REA will endeavor to have the contracts or proposals made reasonable. The REA borrower or potential borrower shall be made a party to any negotiations between REA and such power supplier. When necessary to avoid dilatory tactics or protracted delays, the Administrator shall advise the parties in such cases of a definite time limit for negotiations under the survey and a final cut-off date for all proposals which are to be considered in evaluation of loan applications

related to the problems and needs covered by the survey.

C. Requirement for Consideration of Loan Application: No loans for generation or transmission facilities will be made until a power supply survey has been completed by REA. No application for financing of generation or transmission facilities requiring a loan for either or both in an amount of more than $2 million will be accepted for consideration by REA unless (a) a power supply survey has been completed, or (b) it is determined by the Administrator that completion of the survey requires full review of proposed REA-financed generation or transmission facilities.

D. Certification of Loans for Generation or Transmission: No loan for generation or transmission facilities will be made except in compliance with Bulletin 20-6, "Loans for Generation and Transmission," dated May 31, 1961, and upon certification by the Administrator to the Secretary of Agriculture that the loan has been approved after the completion of a power supply survey which shows that the loan is (a) needed to construct facilities to implement an existing contract or a proposed contract with the existing power supplier; or (b) needed to provide facilities or service for which there is no existing or proposed contract from any other power supplier; or (c) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier involved was so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed suppliers had

failed or refused to do so within the time set by the Administrator. Loans for generation or transmission facilities of more than $2 million shall be similarly certified to the Comptroller General. They shall also be certified to the Senate and the House of Representatives of the United States, as directed by the respective bodies. Certification of each generation or transmission loan in excess of $2 million shall be accompanied by the following information:

1. The name and address of the applicant borrower and the date of the application.

2. Description and estimated cost of the proposed facilities are the initial or additional unit or units of a plant comprised of one or more units.

3. Description and estimated cost of proposed transmission facilities, including any immediate or future plans to interconnect with other transmission systems.

4. Description of any long-range plans the applicant may have for construction of additional generation and transmission facilities and the estimated cost of the planned facilities.

5. Comparison of the estimated costs of generation by the applicant borrower with the cost of power available from existing suppliers, including the final offer by the private supplier including terms and conditions he offered to meet applicant's long-term energy needs.

6. Summary of the efforts made by the applicant and by REA to obtain the applicant's power

and energy requirments from existing power suppliers and the reason why such efforts have not been successful.

7. Explanation of the applicant's reasons for seeking an REA loan.

8. The amount of electric energy which the applicant will cease to purchase from present power suppliers upon construction of the generating plant for which REA financing is being sought.

9. Explanation of the extent to which the feasibility of the requested loan for generation and transmission facilities depends upon the use of a portion of the facilities by others (including Federal power marketing agencies).

10. Details of the applicant's plans to sell or otherwise make available any of the power and energy from the proposed generation facilities to others (including Federal power marketing agencies).

11. Names of State agencies and commissions having jurisdiction over the applicant borrowers.

Norman M. Clapp
Administrator

APPENDIX E

EXCERPTS FROM CONGRESSIONAL COMMITTEE REPORTS AND SUBCOMMITTEE HEARINGS

H. R. REP. NO. 355, 88TH, CONG., 1ST SESS. 7, 8 (1963):

"RURAL ELECTRIFICATION PROGRAM

* * *

"A majority of the members of the committee believe the right to make loans for power generation and transmission purposes, with funds available to implement such right, if necessary, is absolutely essential to enable REA cooperatives to obtain reasonable contracts from private power suppliers with regard to rates, terms, and conditions. However, a study of the REA Act and its history clearly shows it was never intended that this authority be used except for substantial reasons, and not merely to supplant private suppliers.

* * *

"Before public funds are loaned for power generation or transmission, a majority of the committee believes the REA Administrator, in connection with any such loan, should make a survey, determine wherein the existing contract for power or the proposed contract is unreasonable, advise the supplier wherein such contract is unreasonable and attempt to get such contract modified to make it reasonable. Loans should be made only when reasonable contracts cannot be obtained.

"With regard to any further generation and transmission loan approved, the Administrator should certify to the Secretary of Agriculture that each of these steps has been taken and that the private supplier had been given an opportunity

to make the contract reasonable, specifying the details, and had refused or failed to do so. * * * "

SEN. REP. NO. 497, 88TH CONG., 1ST SESS. 27 (1963):

"RURAL ELECTRIFICATION ADMINISTRATION

"ELECTRIFICATION LOAN PROGRAM

* * *

"The committee recognizes that the House recommended a new procedure for REA after hearing the differing points of view surrounding the loans made by the Rural Electrification Administration for generation and transmission purposes.

"This committee concurs with the recommendations set forth in the House committee report, to wit:

"Before public funds are loaned for power generation or transmission, the Rural Electrification Administrator, in connection with any such loan, should:

"(1) Make a survey and determine wherein the existing contract for power or the proposed contract is unreasonable;

"(2) Advise the supplier wherein such contract is unreasonable; and

"(3) Attempt to get such contract modified to make it reasonable.

"Loans should be made only when reasonable contracts cannot be obtained.

"With regard to any further generation and major transmission loan approved in excess of $2,000,000, the Administrator shall certify to the Secretary of Agriculture, the Comptroller General, and the Congress, that each of these

steps has been taken and that the private supplier had been given an opportunity to make the contract reasonable, specifying the details, and had refused or failed to do so.

"The Administrator also shall furnish the Comptroller General and the Congress on the date of approval of each such loan application, the following information:

"(1) The name and address of the applicant borrower and the date of the application.

"(2) Description and estimated cost of proposed generation facilities. Indicate if the proposed facilities are the initial or additional unit or units of a plant comprised of one or more units.

"(3) Description and estimated cost of proposed transmission facilities, including any immediate or future plans to interconnect with other transmission systems.

"(4) Description of any long-range plans the applicant may have for construction of additional generation and transmission facilities and the estimated cost of the planned facilities.

"(5) Comparison of the estimated costs of generation by the applicant borrower with the cost of power available from existing suppliers, including the final offer by the private supplier including terms and conditions he offered to meet applicant's long-term energy needs.

"(6) Summary of the efforts made by the applicant and by REA to obtain the applicant's power and energy requirements from existing power suppliers and the reasons why such efforts have not been successful.

"(7) Explanation of the applicant's reasons for seeking an REA loan.

"(8) The amount of electric energy which the applicant will cease to purchase from present power suppliers upon construction of the generating plant for which REA financing is being sought.

"(9) Explanation of the extent to which the feasibility of the requested loan for generation and transmission facilities depends upon the use of a portion of the facilities by others (including Federal power marketing agencies).

"(10) Details of the applicant's plans to sell or otherwise make available any of the power and energy from the proposed generation facilities to others (including Federal power marketing agencies).

"(11) Names of State agencies and commissions having jurisdiction over the applicant borrowers. * * * "

H. REP. 1088, 88TH CONG., 1ST SESS. 11 (1963):

"RURAL ELECTIFICATION ADMINISTRATION

" * * * Regulations, including changes, to carry out provisions in the reports of the House and Senate Committees shall be printed in the Federal Register within 90 days of enactment of this Act. * * * "

HEARINGS BEFORE SUBCOMMITTEE OF H. R. COMMITTEE ON APPROPRIATIONS, DEPARTMENT OF AGRICULTURE APPROPRIATIONS FOR 1965, 88TH CONG., 2D SESS., PART 4, P. 12 (1964):

" * * * MR. CLAPP. I might briefly summarize at this time. The House Committee last year, in its report, made certain recommendations with respect to our procedures on generation and transmission loans and section 5 loans. With

respect to generation and transmission loans, it directed that we should make a survey before loaning any further funds for these purposes and that in cases where there were existing or proposed contracts we should, if these contracts are deemed unreasonable, be sure to give the supplier a statement as to the particulars in which we regarded them as unreasonable, give the supplier an opportunity and assist him in any way we could to make them reasonable, and make the loan only if he neglected or failed or refused to do so. We were also directed to certify to the Secretary of Agriculture in connection with any future generation or transmission loans, that the survey had been made and that these steps had been followed.

"Bulletin 111-3, which was issued February 24, outlines the procedures and policies which we now follow in response to this language of the House committee and also in response to language of the Senate committee generally endorsing the House language and adding certain procedures with respect to generation and transmission loans of over $2 million.

"Briefly, this bulletin provides that we do not make any generation or transmission loan without making the survey as recommended by the committee. And we make the certification to the Secretary, when such a loan is made, that the survey has been made and that the loan is necessary, based upon our normal criteria for generation and transmission loans, either because it is needed to construct facilities to implement an existing contract, or a proposed contract with an existing power supplier, or because it is needed to provide facilities or service for which there is no existing or proposed contract from any other power supplier, or in the case of the type of situation specifically spelled out by

the committee language, where there are existing contracts or proposed contracts which we have regarded as unreasonable; that we have in the course of the survey advised the supplier in what way these contracts or proposals are unreasonable, and given the supplier an opportunity to make them reasonable; and that the loan is made and is necessary because in spite of these efforts the contracts or proposals have not in fact been made reasonable.

"In connection with the generation and transmission loans of over $2 million, to which the Senate committee addressed its report, we make a more detailed certification which is supplied to the Comptroller General and the Senate and the House of Representatives as directed by these respective bodies. This not only certifies to the fact the survey has been made, but it also supplies information in response to 11 specific questions set forth in the committee report. * * *"

HEARINGS BEFORE SUBCOMMITTEE OF THE SEN. COMMITTEE ON APPROPRIATIONS ON H. R. 11202, 88TH CONG., 2D SESS., VOL. II, P. 117, 118 (1964):

" * * * Senator Holland. All right. Now, Mr. Clapp, I have before me your letter of June 22 in which you recite the Senate Committee report accompanying the 1964 bill and the House committee report and include references to procedural bulletins that have been issued by your agency.

"Can you assure the committee that the procedures which have been set forth in your new regulations comply with the Senate committee reporting requirements?

"REA COMPLIANCE WITH DIRECTIVES

"Mr. Clapp. We feel that they fully comply with the re-

quirements, Mr. Chairman, and as the letter indicates, we have actually gone a little bit beyond the requirements to assist the committees in keeping their records current.

* * *

"June 22, 1964.

"Hon. Spessard L. Holland,
U. S. Senate.

"Dear Senator Holland: Senate Report No. 497 accompanying the Department of Agriculture and related agencies appropriation bill for 1964, contained a number of recommendations, requests, and instructions concerning activities of the Rural Electrification Administration. In addition, the conference report on this bill provided that regulations, including changes, to carry out provisions of the reports of the House and Senate committee should be printed in the Federal Register within 90 days of enactment of this act. This letter summarizing REA actions, including (sic) issuances which were developed or changed, and materials placed in the Federal Register, pursuant to the reports of the Committees on Appropriations and the conference report.
* * *"

H. R. REP. NO. 1387, 88TH CONG., 2D SESS. 44 (1964):

"* * * The Administrator of REA is to be commended for his cooperation in formulating and issuing regulations in accord with the directives in last year's reports of the House and Senate committees. In connection with last year's report of this Committee, it should be clearly understood that the directives contained therein were intended to apply to generation and transmission loans to G&T cooperatives and not to relatively small transmission loans to distribution co-

operatives. The regulations issued recently pursuant to these directives should be interpreted and administered on this basis. * * *"

SEN. REP. NO. 1331, 88TH CONG., 2D SESS. 36 (1964):

" * * * Last year the committee report directed the Administrator of the Rural Electrification Administration and the Secretary of Agriculture to carry out certain procedures in connection with generation and transmission loans and loans made under section V of the Rural Electrification Act. It is the belief of the committee that the Administrator has responded to these committee directives and the committee is hopeful that the Administrator will see to it that these directives are carried out in the current fiscal year. * * * "

SEN. REP. NO. 423, 89TH CONG., 1ST SESS. 32 (1965):

" * * * This committee, in conjunction with the House Committee, in Report No. 497, 88th Congress, 1st session, imposed certain duties and responsibilities upon the REA Administrator to its borrowers and their power suppliers to be complied with before approving loans for generation and transmission facilities.

"The committee directs the REA Administrator's attention to this action and the regulations promulgated thereunder and reiterates its instructions that every effort be made to obtain reasonable wholesale power supply contracts before lending public funds for generation and transmission facilities. * * *"

* * * * *

APPENDIX F

REPORT TO THE SUBCOMMITTEE ON DEPARTMENT OF AGRICULTURE AND RELATED AGENCIES COMMITTEE ON APPROPRIATIONS UNITED STATES SENATE

Examination Into Alternative Transmission Plans Considered Prior To Approval Of A Loan To East River Electric Power Cooperative, Inc.

Madison, South Dakota

Rural Electrification Administration

Department Of Agriculture

By

The Comptroller General
Of The United States

February 1966

Comptroller General Of The United States

Washington 25

B-157545

Dear Mr. Chairman:

Herewith is a report on our examination into alternative transmission plans which were considered prior to approval of a loan made to the East River Electric Power Cooperative, Inc., Madison, South Dakota, on May 24, 1965, by the Rural Electrification Administration, Department of Agriculture.

Our review was made pursuant to your request of August 18, 1965, that our Office make a thorough examination of the cost and feasibility of each of the three transmission plans considered by the Rural Electrification Administration prior to its decision to make a loan to East River and that we submit our findings and evaluation to the Subcommittee on Department of Agriculture and Related Agencies, Senate Committee on Appropriations.

The use of $6,136,343 in loan funds was approved principally to finance the construction of new transmission facilities and to modify and relocate existing transmission facilities in Minnesota ($1,892,000) and South Dakota ($4,244,343).

Prior to approval of the loan to East River, the Rural Electrification Administration considered for approval both a straight-wheeling transmission plan and a joint transmission plan offered by the Northern States Power Company, Minneapolis, Minnesota, and the Otter Tail Power Company, Fergus Falls, Minnesota, as well as an independent transmission plan proposed by East River. These three plans provided for alternative methods of supplying power to East River's two Minnesota member cooperatives. According to agency records, the manner in which power was to be supplied to East River's member cooperatives in South Dakota and the use of loan funds for this purpose were not subjected to alternatives. The Administration, after a review of the various plans, approved the independent plan.

During our review, we found no evidence indicating that any of the three plans considered by the Administration would not be feasible from an engineering standpoint. We noted, however, that, according to the Administration, the

independent plan, although considered adequate, will provide a less reliable transmission system than would have been available under the straight-wheeling plan or the joint plan.

In approving the independent plan rather than the straight-wheeling plan, the Administration concluded that the estimated $775,000 higher costs of operation of the straight-wheeling plan during the 10-year period 1966 through 1975 rendered it unacceptable. On the basis of our examination, we have no reason to question this conclusion because (1) the records show that the straight-wheeling plan would result in higher cost for the cooperatives and (2) the Administration's decision appears to be consistent with its announced policy to finance the construction of transmission facilities where the rates offered by existing power sources would result in a higher cost for the cooperatives than the cost from facilities financed by the Rural Electrification Administration.

In rejecting the joint plan in favor of the independent plan, the Administration considered that the following factors supported its decision: (1) during the period 1965 through 1968, the independent plan would require estimated lower initial loan funds of $338,000 and (2) the joint plan would produce estimated savings of $138,000 in costs of operation during the period 1966 through 1975; but these savings might be offset by approval of the independent plan because of (a) possible savings in construction and operation of the transmission line from Granite Falls, Minnesota, to Marshall, Minnesota, (b) possible savings through utilization of excess capacity to serve additional customers and achieve greater operational flexibility, and (c) the possibility that the joint plan would involve in-

creased costs to East River over which neither East River nor the power companies would have control. The Administration concluded that, while no one of these factors considered separately would justify approval of the independent plan, the combination of these factors would justify the approval.

We have evaluated each of the factors cited by the Administration in support of its decision to approve the independent plan instead of the joint plan and have included our conclusion on each of these factors in our report. Our review indicates, among other things, that the adoption of the independent plan is expected to require $647,000 of additional investment funds for the period 1965 through 1976 compared with savings of loan funds of $338,000 for the shorter period from 1965 through 1968.

Solely on the basis of the foreseeable benefits of the joint plan—that is, estimated savings of $647,000 of investments through 1976 and, as shown by agency records, estimated savings of $138,000 in costs of operation during a 10-year period—it appears to us that adoption of the joint plan would have resulted in greater economies to East River than would the adoption of the independent plan. In addition, the Administration considered the joint plan to offer a more reliable system than the independent plan offered.

In approving the independent plan, the Administration cited certain possibilities for achieving economies under this plan which might offset the foreseeable benefits of the joint plan. We believe that the Administration did not fully explore these possibilities in order to ascertain their likelihood of occurring and the resultant effect on the alternative plans. To what extent the results of further exploration might have affected the decision to approve the inde-

pendent plan cannot be measured as of the time of loan approval; nor is it evident, as of December 31, 1965, that developments subsequent to the loan approval have either confirmed or disproved that such possibilities will materialize.

We wish to call to your attention that East River, the power companies, and the Rural Electrification Administration have not been requested to review and comment on our findings because of the extensive testimony and documents submitted to your Subcommittee in response to your request that complete data be furnished so that our Office would not have to obtain additional information from the parties concerned.

We plan to make no further distribution of this report unless copies are specifically requested, and then copies will be distributed only after your approval has been obtained or public announcement has been made by you concerning the contents of the report. In deciding whether to make this report public, you may wish to consider the possible implications which a general release of the report may have on a pending suit by the power companies against the Rural Electrification Administration involving the approval of the East River loan.

Sincerely yours,
FRANK H. WEITZEL
Acting Comptroller General
of the United States

The Honorable Spessard L. Holland, Chairman
Subcommittee on Department of Agriculture
and Related Agencies
Committee on Appropriations
United States Senate

* * * * *

REPORT ON EXAMINATION INTO ALTERNATIVE TRANSMISSION PLANS CONSIDERED PRIOR TO APPROVAL OF A LOAN TO EAST RIVER ELECTRIC POWER COOPERATIVE, INC., MADISON, SOUTH DAKOTA

RURAL ELECTRIFICATION ADMINISTRATION DEPARTMENT OF AGRICULTURE

INTRODUCTION

Pursuant to a request dated August 18, 1965, from the Chairman of the Subcommittee on Department of Agriculture and Related Agencies, Senate Committee on Appropriations (appendix I), the General Accounting Office has examined into the cost and feasibility of each of the three alternative transmission plans considered by the Rural Electrification Administration (REA), Department of Agriculture, prior to May 24, 1965, the date on which it approved the use of $6,136,343 in loan funds by the East River Electric Power Cooperative, Inc. (East River), Madison, South Dakota. The loan to East River, consisting of $5,919,000 of new loan funds and $217,343 of funds available from previously approved REA loans to East River, was authorized for a term of 35 years at an interest rate of 2 percent a year.

East River is a transmission cooperative and, as of May 1965, supplied the entire electric power requirements of its 19 South Dakota and 2 Minnesota member distribution cooperatives and the major portion of the requirements of 1 other South Dakota member distribution cooperative. East River has no generation capacity of its own and, as of May 1965, purchased its entire power requirements under a wholesale power contract with the United States Bur-

eau of Reclamation (USBR), Department of the Interior. The three transmission plans considered for approval by REA were a straight-wheeling transmission plan and a joint transmission plan offered by Northern States Power Company, Minneapolis, Minnesota, and Otter Tail Power Company, Fergus Falls, Minnesota, as well as an independent transmission plan proposed by East River. The use of $6,136,343 in loan funds approved by REA was to implement the independent plan proposed by East River and will be used principally to finance the construction of new transmission facilities and to modify and relocate existing transmission facilities in Minnesota and South Dakota. It should be noted that, regardless of the transmission plan approved by REA, $4,244,343 of the loan funds provided was to be used to construct transmission facilities in South Dakota to serve East River's member cooperatives in that State.

Our examination, which was made in Washington, D. C., included a review of applicable laws and legislative history; an examination of pertinent records of REA; interviews with certain REA officials; and correspondence with the Administrator, REA. During our review we did not interview officials of East River, Northern States Power Company, or Otter Tail Power Company because, in addition to the above, the testimony and documents included in hearings on Department of Agriculture and Related Agencies Appropriations for 1966, held by the Subcommittee on Department of Agriculture and Related Agencies, Senate Committee on Appropriations, in June 1965, provided all the information which we considered necessary for a review of the cost and feasibility of the various transmission plans.

A list of the principal officials of the Deparment of Agriculture and the Rural Electrification Administration responsible for the administration of the electric loan program follows.

	Tenure of office	
	From	To
Department of Agriculture		
Secretary of Agriculture:		
Orville L. Freeman	Jan. 1961	Present
Assistant Secretary, Rural Development and Conservation:		
John A. Baker	Aug. 1962	Present
Rural Electrification Administration		
Administrator:		
Norman M. Clapp	Mar. 1961	Present

BACKGROUND INFORMATION ON THE LOAN TO EAST RIVER

The REA loan to East River involves the construction of transmission facilities in both South Dakota and Minnesota. Of the total loan funds approved, $4,244,343 is related to transmission facilities to be constructed in South Dakota and $1,892,000 is related to transmission facilities to be constructed principally in Minnesota.

The REA Administrator stated that justification of the portion of the loan to be used for construction of transmission facilities in South Dakota was based on the need for East River to construct transmission facilities to implement an existing contract with an existing power supplier. The portion of the loan to be used for construction of transmission facilities in Minnesota is needed, according

to the Administrator, because existing and proposed contracts for the straight-wheeling and joint transmission plans submitted by Northern States Power Company and Otter Tail Power Company (hereinafter referred to as the Companies) to provide facilities and service for East River's Minnesota member cooperatives—Lyon-Lincoln Electric Cooperative, Inc. (Lyon-Lincoln), and Traverse Electric Cooperative, Inc. (Traverse)—were unreasonable. In this connection, the Administrator stated that REA attempted to have such contracts made reasonable but that the Companies did not do so within the time limit set by him.

Summarized below, in chronological sequence, are the significant events which led to approval of the loan and the status of the East River loan as of December 31, 1965.

REA records show that, in March 1963, Lyon-Lincoln and Traverse joined the East River transmission system, thus becoming the only two member cooperatives of the East River system in Minnesota. These two cooperatives serve areas in Minnesota bordering on South Dakota, and their power needs are supplied by USBR. These cooperatives, at the time of joining East River's transmission system, were members of the Cooperative Power Association (CPA) and, as CPA members, obtained their power requirements from USBR over the Companies' transmission lines. Upon acceptance of Lyon-Lincoln and Traverse into East River's system, East River became responsible for delivery of power to Lyon-Lincoln and Traverse after their resignations from CPA became effective. From March to December 1963, East River negotiated with the Companies to arrange for delivery of this power. During this period, the Companies continued to wheel (transmit) power

to Lyon-Lincoln and Traverse at rates in effect with the CPA.

When the resignations of the cooperatives from CPA became effective in December 1963 (Lyon-Lincoln) and January 1964 (Traverse), the Companies informed Lyon-Lincoln and Traverse that, since there were no other contractual arrangements, the Companies would have to increase their rates to the existing published rates for service to rural cooperatives.

The negotiations between East River and the Companies resulted in a 22-month transmission contract with the Companies to wheel USBR power at a rate approximating the rate paid by Lyon-Lincoln and Traverse when they were CPA members. This contract, accepted by East River in February 1964, provided for the wheeling of USBR power to the cooperatives through December 20, 1965. The contract, which has subsequently been extended by the parties, allowed time for further negotiations of a long-term transmission arrangement.

In April 1964 the Companies offered East River long-term straight-wheeling proposals. These proposals, which are known as the straight-wheeling transmission plan, were essentially a continuation of the 22-month contract accepted by East River in February 1964. East River rejected this plan on the basis that the proposed rates would result in higher operating costs to East River than those costs which would be incurred by East River if it constructed an independent transmission system in Minnesota. The Companies protested East River's rejection to REA. In May 1964, after discussion with East River and the Companies, REA requested that the Companies submit an alternative plan based on a joint transmission system approach.

On May 26, 1964, East River submitted a loan application to REA for about $6,566,000 to finance construction in accordance with its independent transmission plan.

In July 1964 the Companies submitted a joint transmission plan as requested by REA. Under this joint plan, East River would build, own, and operate certain transmission facilities in South Dakota for the exclusive use of the Companies. Although under each of the three plans certain transmission facilities would have to be constructed principally in South Dakota, additional facilities in South Dakota for the use of the Companies would be constructed only under the joint plan. In exchange for the Companies' free use of these additional transmission facilities, the Companies would wheel power to Lyon-Lincoln and Traverse over the Companies' transmission lines located in Minnesota and such delivery would be without wheeling charges to East River.

In August 1964 REA notified the Companies that the straight-wheeling plan submitted in April 1964 was uneconomical and unduly restrictive. REA advised the Companies that the straight-wheeling plan did not provide transmission service to East River "* * * as economically as our studies indicate East River can obtain by extending its own transmission facilities to serve its Traverse and Lyon-Lincoln members." In addition, REA advised the Companies that certain provisions in the straight-wheeling plan placed restrictions on East River that were not acceptable to REA.

Specifically, REA objected to (1) a provision in the contract proposed by Northern States Power Company limiting the territory which may be served by East River, (2) a provision in the contract proposed by Otter Tail Power

Company prohibiting, without written consent, the assignment of the contract by either party, (3) provisions in the proposed contracts of both Companies prohibiting East River from interconnecting any of its transmission facilities used to receive and distribute the power wheeled over the Companies' facilities with any other power system, and (4) provisions in the proposed contracts of both Companies prohibiting East River, Lyon-Lincoln, and Traverse from serving areas which they have developed but which may have been annexed or which may be subsequently annexed by a city or village being served by one of the Companies.

REA also advised the Companies that it considered the joint plan unreasonable because, among other things, East River would have full financial responsibility, except for normal maintenance, for certain facilities in South Dakota but would have no right to use the facilities and would receive in exchange only limited power deliveries over the Companies' facilities in Minnesota. REA outlined certain basic requirements which would have to be met in order to make the Companies' joint plan acceptable to REA. These requirements included the provision that the facilities to be constructed under the joint plan serve a useful function for East River and the Companies and that the amount and extent of such facilities provided by each party be equitable and result in economies for both parties.

REA records show that, in September 1964, REA and the Companies reached an understanding as to the nature of the requirements and agreed that the next contract proposal would be submitted by October 5, 1964, and would be the final offer which could not be changed.

On October 2, 1964, the Companies submitted to REA

the contract proposal for a joint transmission system with East River. Under this proposal, East River would build a 40-mile transmission line from Sioux Falls to Mitchell, South Dakota; a 54-mile transmission line from Ortonville, Minnesota, to Victor, South Dakota; and a substation at Canistota, South Dakota. These facilities would be owned and operated by East River and integrated into the existing systems of the Companies, and the Companies would be permitted to use these facilities without cost. East River would retain a limited service right on each line and a limited capacity usage right in the substation. The construction of these facilities would be in addition to other facilities to be constructed in South Dakota by East River under the various plans. In return for the Companies' use of these additional facilities to be constructed by East River, the Companies proposed to provide, without charge, specified basic wheeling services required by East River's two Minnesota member cooperatives through 1985.

Agency records show that on January 20, 1965, East River submitted to REA a revised loan estimate reducing the loan fund application of May 1964 by $948,000 to $5,618,000. East River advised REA that the reduction was due to a change in the plan of service and a reappraisal of the investment requirements. REA studied East River's revised loan requirements and developed the requirements and comparative costs of the various plans of providing service to the Minnesota members of the East River system. The study by REA showed that a total of $6,136,343 of funds would be required to implement the independent transmission plan. Of this total loan amount $1,892,000 was applicable to the Minnesota portion of the loan.

By letters dated May 17, 1965, REA notified the Companies that, as previously stated by REA in August 1964, adoption of the straight-wheeling plan would result in higher operating costs to East River and was therefore not acceptable. REA also advised the Companies that, although adoption of the joint plan would give East River "marginal annual economic benefits," the plan offered the disadvantages of (1) greater initial investment requirements, (2) increased costs to East River which could possibly develop and over which neither East River nor the Companies would have control, and (3) lack of flexibility by which East River might take advantage of possible future beneficial joint arrangements with the Companies, the USBR, the Missouri Basin Systems Group, or others. The Companies were advised that, because of these disadvantages in the joint plan, REA had decided to proceed with consideration of the independent transmission plan. Our review showed that REA considered the Companies' joint plan to satisfy all the requirements previously set forth with the exception that REA did not consider the proposal of October 2, 1964, to result in economies to East River.

On May 24, 1965, the Administrator approved a $5,919,000 loan to East River for a term of 35 years at an interest rate of 2 percent a year and authorized the use of an additional $217,343 of funds available from loans previously approved by REA for East River. Of the total amount of $6,136,343 approved, $1,892,000 was for use in Minnesota and $4,244,343 was for use in South Dakota.

The loan proceeds pertaining to Minnesota are to be used for financing the construction of 216 miles of transmission lines, the construction of two substations and related transmission facilities, the modification of four ex-

isting substations, the relocation and modification of five existing substations, and miscellaneous improvements. Of the $4,244,343 pertaining to South Dakota, $3,410,000 is to be used for financing the construction of 263 miles of transmission lines, the construction of 22 substations and related transmission facilities, the modification of 153 miles of transmission lines, the relocation of 1 existing substation, and miscellaneous improvements. The balance of $834,343 is to reimburse East River for general funds used for previously approved construction in South Dakota of 66 miles of transmission lines and five substations and related transmission facilities.

At the time of loan approval, the Administrator provided for $1,892,000 of the borrower's approved loan funds (the Minnesota portion) to be held under special control and to be released only upon East River's satisfactory compliance with and REA's approval of the following requirements: (1) satisfactory wholesale power contracts with a minimum term of 35 years between East River and Traverse and between East River and Lyon-Lincoln, (2) a letter of intent from USBR to enter into contractual agreements for supplying power to East River, and (3) evidence that East River has chosen the most economical service plan for a proposed Granite Falls to Marshall, Minnesota, transmission line. As of December 31, 1965, East River had not complied with any of the conditions outlined above and REA had not released the Minnesota portion of the loan funds to East River.

On August 11, 1965, the Companies filed suit against the Administrator, REA, and others in the United States District Court, District of Minnesota, Fourth Division. The suit, among other things, seeks to enjoin REA from ad-

vancing any of the loan funds to East River. The Companies alleged that REA did not advise them of the unreasonableness of their proposed contract (joint plan) nor afford them an opportunity to make the proposed contract reasonable as required by directions relating to certain activities of REA and its approval of loans for generation or transmission facilities, issued by the Senate Committee on Appropriations in Senate Report 497, dated September 12, 1963, on the Department of Agriculture and Related Agencies Appropriation Bill, 1964. The Companies alleged further that REA did not implement agency regulations contained in REA Bulletin 111-3, dated February 24, 1964.

On September 17, 1965, the Companies filed a motion for a preliminary injunction and, pending action on the motion, a temporary restraining order was issued by the Court on that date against the advance of loan funds by REA.

On October 11, 1965, the United States Department of Justice, on behalf of REA, submitted to the United States District Court of Minnesota a motion for dismissal of the suit and alternatively for a summary judgment. The Department of Justice contended that (1) the Companies lacked standing to sue, (2) the Companies' action constituted an unconsented suit against the United States, and (3) the authority of REA to make loans under the Rural Electrification Act of 1936 (7 U.S.C. 901) had been committed to the unreviewable discretion of the Administrator and was, therefore, not judicially reviewable.

On December 31, 1965, the Court denied the Department of Justice's motion for dismissal of the suit or for a summary judgment and denied the Companies' motion for a preliminary injunction. The temporary restraining order

dated September 17, 1965, was vacated. Thus, as of December 31, 1965, the Companies' suit was still pending.

EVALUATION OF THE COST AND FEASIBILITY OF THE STRAIGHT-WHEELING, JOINT, AND INDEPENDENT TRANSMISSION PLANS

Prior to its approval on May 24, 1965, of a loan to East River, REA considered for approval both a straight-wheeling plan and a joint plan offered by the Companies as well as an independent transmission plan proposed by East River. These three plans provided for alternative methods of supplying power to East River's two Minnesota member cooperatives. According to REA records, the manner in which power was to be supplied to East River's member cooperatives in South Dakota and the use of loan funds for this purpose were not subjected to alternatives. After examination of the various plans, REA determined that the independent plan should be approved for East River rather than the straight-wheeling plan or the joint plan.

Presented below is our evaluation and conclusion on the cost and feasibility of each of the three plans considered by REA. A summary of the estimated investment requirements for each of the three plans is shown in appendix II and a summary of the estimated costs of operation of the three plans is shown in appendix III.

The periods of time used in this report which relate to investment requirements are 1965-68, 1965-74, and 1965-76. These periods represent the time between May 24, 1965, the date of loan approval, and the end of the respective calendar year involved. (See note c in appendix II.) The 10-year period used by REA in comparing the

costs of operation of the various plans was the 10 calendar years 1966 through 1975.

STRAIGHT-WHEELING TRANSMISSION PLAN

The straight-wheeling transmission plan proposed by the Companies provided that they would use their facilities in Minnesota to wheel USBR power to East River's member cooperatives in Minnesota (Lyon-Lincoln and Traverse) under long-term wheeling contracts with East River. Under the plan East River would acquire the existing substations and other transmission facilities of Lyon-Lincoln and Traverse and would be required to provide all necessary future transmission taps into the Companies' system and to provide all necessary substations.

On the basis of comparisons between the estimated operating costs of the straight-wheeling plan and the independent plan, REA concluded that the straight-wheeling plan was not economically justified because of the estimated $775,000 additional costs of operation during the 1966-75 period. When REA advised the Companies on May 17, 1965, that the straight-wheeling plan was not acceptable, the restrictive provisions to which REA previously objected (see p. 7) were not set forth as reasons for rejecting this plan.

The Deputy Assistant Administrator, Electric, REA, advised us that, although the REA records do not "appear to state explicitly" that consideration was given to possible savings of initial loan funds under the straight-wheeling plan, the Administrator had considered the savings of loan funds under the straight-wheeling plan but had made the determination that the higher costs of $775,000 under the straight-wheeling plan rendered it unacceptable.

Following is our evaluation of the feasibility of the straight-wheeling plan and the factors considered by REA in rejecting this plan.

Feasibility of plan

During our review, we found no evidence which would indicate that the straight-wheeling plan was not feasible from an engineering standpoint. This plan appears to be feasible inasmuch as the Companies have been wheeling power to East River's two Minnesota member cooperatives under a temporary straight-wheeling arrangement with East River since February 1964; as of December 31, 1965, this wheeling arrangement had been extended.

Costs of operation

Our review of REA records shows that, as summarized in appendix III, the estimated operating costs of the straight-wheeling plan during the period 1966-75 would be $2,681,000. When compared with the estimated costs of operation of $1,906,000 under the independent plan during the same period, the straight-wheeling plan would be $775,000 higher than the independent plan.

A comparison of the estimated costs of operation of the straight-wheeling plan and of the joint plan ($1,768,000) during the 1966-75 period shows that costs under the straight-wheeling plan would be $913,000 higher than costs under the joint plan.

Loan fund and investment requirements

As used by REA, loan fund requirements represent the funds to be provided to East River by REA in accordance with the terms of the May 24, 1965, loan agreement. These loan funds will be required by East River during the 1965-

68 period. Investment requirements, as used by REA, represent the initial REA loan funds provided for the 1965-68 period *plus* additional funds—REA loan funds or other sources of capital—required by East River during the 1969-74 period and the 1975-76 period.

Our review of REA records shows that, as summarized in appendix II, the estimated initial loan fund requirements for the straight-wheeling plan during the period 1965-68 would be $548,000. During the longer period 1965-74, the initial loan fund requirements plus additional investments would amount to $597,000. This amount would remain the same for the period 1965-76.

When compared with similar requirements under the independent plan, the straight-wheeling plan would require $1,344,000 less loan funds during the 1965-68 period, $1,644,000 less loan and investment funds during 1965-74 period, and $2,329,000 less loan and investment funds during the 1965-76 period.

A comparison of the straight-wheeling plan with the joint plan shows that, for each of the periods shown in appendix II, the loan fund and investment requirements would be $1,682,000 less under the straight-wheeling plan.

Conclusion

During our review, we found no evidence which would indicate that the straight-wheeling plan was not feasible from an engineering standpoint. On the basis of our examination of the reasonableness of figures used by REA in its cost comparisons of the straight-wheeling plan and the independent plan, we have no reason to question REA's statement that the independent plan would produce savings of $775,000 in costs of operation during the 1966-75 period.

It appears that REA's decision to reject the straight-wheeling plan because of the higher costs of operation is in conformity with REA's announced policy for financing the construction of transmission facilities where the rates offered by existing power sources would result in a higher cost to the cooperatives than the cost from facilities financed by REA.

In view of the above, we have no reason to question REA's rejection of the straight-wheeling plan.

JOINT AND INDEPENDENT TRANSMISSION PLANS

Under the joint transmission plan offered by the Companies on October 2, 1964, East River would acquire the transmission and related facilities of Lyon-Lincoln and Traverse and would build a 40-mile transmission line from Sioux Falls to Mitchell, South Dakota; a 54-mile transmission line from Ortonville, Minnesota, to Victor, South Dakota; and a substation at Canistota, South Dakota. These facilities would be owned and operated by East River and would be integrated into the existing systems of the Companies. The Companies would be permitted to use these facilities without cost. East River would retain a limited service right on each line and a limited capacity usage right in the substation. The construction of these facilities would be in addition to other facilities to be constructed in South Dakota by East River under the independent plan. In return for the Companies' use of these additional South Dakota facilities to be constructed by East River, the Companies proposed to provide, without charge, certain specified basic wheeling service required by East River's two member cooperatives in Minnesota through 1985.

Under East River's proposed independent transmission plan, East River would acquire the transmission and related facilities of Lyon-Lincoln and Traverse and would build, own, and operate a transmission system in Minnesota to serve the future power requirements of the two member cooperatives. No facilities would be built in South Dakota for use by the Companies. The proposed transmission system, to be constructed during the 1965-68 period, would consist of 29 miles of transmission line from Granite Falls to Marshall, Minnesota; 31 miles of transmission line from Marshall to Tyler, Minnesota; 34 miles of transmission line from Tyler, Minnesota, to Astoria, South Dakota; 34 miles of transmission line from Morris to Beardsley, Minnesota; 16 miles of transmission line from Graceville to Wheaton, Minnesota; 58 miles of transmission line from Morris to Doran, Minnesota; and two substations and related transmission facilities. The proposed system would also require 14 miles of transmission line for two transmission taps, modification of four existing substations, relocation and modification of five existing substations, and miscellaneous improvements.

In concluding that the joint plan should be rejected in favor of the independent plan, REA cited the following factors in support of its decision.

1. During the period 1965-68, the independent plan would require initial loan funds $338,000 less than those required for the joint plan.

2. The joint plan would produce only marginal savings ($138,000) in costs of operation over a 10-year period, and REA considered other factors as offsetting such savings. (See 3, 4, and 5.)

3. The marginal savings of the joint plan might be offset by possible savings in construction and operation of the transmission line from Granite Falls to Marshall, Minnesota.

4. The marginal savings of the joint plan might be offset by possible savings through utilization of excess capacity and because of greater operational flexibility which might be achieved if East River could participate in future joint transmission arrangements unknown to REA at the time of loan approval.

5. The marginal savings of the joint plan might be offset by the possibility that the joint plan would involve increased costs to East River over which neither East River nor the Companies would have control.

REA concluded that, although no single factor listed above would justify approval of the independent plan rather than the joint plan, the combination of these factors would justify the approval.

Following is our evaluation of the feasibility of the joint and independent plans and of each of the foregoing factors cited by REA in justification of its approval of the independent plan.

Feasibility of plans

Our review of REA records showed that, prior to its approval of the East River loan, REA recognized that service reliability under the independent plan, *although considered acceptable,* would be lower than that available under the joint plan. We noted that the proposed independent plan would offer only one-way feed service which is

considered a less reliable type of transmission service than the two-way feed service that would be available from the Companies' existing transmission system in Minnesota under the joint plan. We noted also that the straight-wheeling plan offers two-way feed service.

An REA engineer advised us that one-way feed service consists of a circuit which starts at a power supply point and, after running through an area, terminates without returning to the same or another power supply point whereas two-way feed service consists of a circuit which starts at a power supply point and, after running through an area, returns to the same or another power supply point. Thus, under a two-way feed service, the system would be more reliable because power would be available from more than one source.

Our review disclosed that about $250,000 of the loan funds to be used in South Dakota are for the addition of tie lines for two-way feed service to improve service reliability.

Conclusion

We noted that REA considers the one-way feed service under the independent plan acceptable but less reliable than the two-way feed service offered by the joint plan. We found no evidence, however, which would indicate that either the joint plan or the independent plan was not feasible from an engineering standpoint.

Evaluation of REA statement that, during the period 1965-68, the independent plan would require initial loan funds $338,000 less than those for the joint plan

Our review of REA records showed that, as summarized in appendix II, East River's estimated initial loan fund re-

quirements for the independent plan during the 1965-68 period would be $1,892,000. During the longer period 1965-74, the estimated initial loan fund requirements plus additional investments would amount to $2,241,000; and, during the still longer period 1965-76, the estimated initial loan fund requirements plus additional investment would amount to $2,926,000.

When compared with similar requirements of the joint plan, the independent plan would require $338,000 less loan funds during the 1965-68 period, $38,000 less loan and investment funds during the 1965-74 period, but $647,000 more loan and investment funds during the 1965-76 period.

The investments to be made under the independent plan after the 1965-68 period, which are not required under the joint plan, are for (1) construction in 1972 of a substation at Marshall, Minnesota, and a circuit breaker at Granite Falls, Minnesota, at an estimated cost of $300,000 and (2) construction in 1976 of 29 miles of transmission line from Marshall, Minnesota, to a point near Ivanhoe, Minnesota, of a substation near Ivanhoe, and of a regulating station and circuit bus near Morris, Minnesota, at an estimated cost of $685,000.

During our review we did not find any documentation which showed why REA's decision to approve the independent plan, rather than the joint plan, took into consideration loan fund requirements for only the 1965-68 period. The Deputy Assistant Administrator, Electric, REA, advised us that the 1965-68 period was used because it represented the period during which East River estimated that the construction of the independent system was to be accomplished.

As noted above, the total investment required during the 1965-76 period to implement the independent plan, as shown by REA records, would be $647,000 more than would be needed to implement the joint plan during the same period. Thus, if the longer period had been considered, the adoption of the joint plan could have resulted in a potential saving of as much as $647,000 in REA loan fund requirements for East River, because the estimated additional investments beyond 1968 may required the use of REA loan funds by East River in the future. For example, we noted that REA's analysis of the costs of operation of the independent plan during the 10-year period 1966-75 included, among other things, the interest cost associated with additional REA borrowings of $349,000 through 1975.

REA's rationale that savings in loan funds was a factor in favor of its decision to approve the independent plan instead of the joint plan appears to have similar application in a comparison of the loan fund requirements under the independent plan and the straight-wheeling plan. As shown on page 16, the straight-wheeling plan would require $1,344,000 less loan funds than would the independent plan during the 1965-68 period, $1,644,000 less loan and investment funds during the 1965-74 period, and $2,329,000 less loan and investment funds during the 1965-76 period. Apparently REA did not consider the savings in loan funds and investments sufficient to offset the higher costs of operation of the straight-wheeling plan.

Conclusion

REA's determination that the joint plan would require a higher initial investment (1965-68) when compared with

the independent plan is supported by REA's economic studies; however, on the basis of information in the REA records, we believe that REA's statement that the savings in initial loan fund requirements was a factor contributing to its approval of the independent plan does not provide full disclosure of known economic factors. Since REA's analysis of the costs of operation of the various transmission plans, made on the basis of a 10-year projection, included, among other things, the interest cost associated with additional borrowings from REA through 1975, we believe that REA borrowings contemplated through 1975 should also have been used by REA in arriving at conclusions regarding known investment requirements.

Also, since the independent plan will require, through 1976, as much as $647,000 more investment funds than the joint plan would require, we believe that, from the standpoint of saving loan funds, the joint plan would be economically advantageous over this longer period.

Evaluation of REA statement that the joint plan would produce only marginal savings ($138,000) in costs of operation over a 10-year period

Our review of REA records showed that, as summarized in appendix III, the estimated operating costs of the independent plan during the 10-year period 1966-75 would be $1,906,000. When compared with the estimated costs of operation of $1,768,000 under the joint plan during the same period, the costs under the independent plan would be $138,000 higher.

Conclusion

On the basis of our examination of the reasonableness

of figures used by REA in its cost comparisons of the two plans, we have no reason to question REA's statement that the joint plan would produce estimated savings of $138,000 in costs of operation during the 1966-75 period.

Evaluation of REA statement that the marginal savings of the joint plan might be offset by possible savings in construction and operation of the transmission line from Granite Falls to Marshall, Minnesota

The REA records showed that $380,000 of the total initial loan funds approved for implementing the independent plan in Minnesota was for construction costs, during the 1965-68 period, of 29 miles of 115-kilovolt transmission line and related facilities between Granite Falls and Marshall, Minnesota. The records showed also that $356,000 of the total costs of operation of the independent plan during the 1966-75 period was applicable to the operation of the Granite Falls to Marshall line. Our review of REA records showed further that an additional $300,000 would be required for East River's construction of a substation at Marshall and a circuit breaker at Granite Falls in 1972 (not included in the 1965-68 initial loan fund requirements).

In connection with the Granite Falls to Marshall line, REA considered the following possibilities as factors which might offset the marginal savings in costs of operation offered by the joint plan:

1. The possibility that USBR would construct transmission facilities between Granite Falls and Marshall and offer East River a delivery point at Marshall, thereby *relieving East River of the cost of con-*

struction and operation of the Granite Falls to Marshall line.

2. The possibility that, if East River constructs the Granite Falls to Marshall line in accordance with specifications of the Missouri Basin Systems Group, the facilities would be included in a Missouri Basin Systems Group pooling agreement under which the costs of operation *would be shared to some extent* by other members of the Group.

3. The possibility that East River could obtain use of the excess transmission capacity available in Northern States Power Company's existing transmission line between Granite Falls and Marshall *at lower annual costs* in lieu of East River's construction and operation of its own facilities between these locations.

With regard to the first possibility that USBR might build and operate a transmission line and related facilities from Granite Falls to Marshall, we noted that, on March 25, 1965—about 2 months before REA approved the independent plan—the USBR advised REA by letter that "* * * the Bureau at this time is not in a position to make a commitment concerning the possibility that it will construct * * * this line."

In addition to the above, we noted that the construction of a transmission line by USBR from Granite Falls to Marshall may not be possible because of the "Keating Amendment" to the Public Works Appropriation Act, 1965 (78 Stat. 682). Since its original inclusion in 1951, the Keating Amendment has been included as an appropriation limitation in every USBR appropriation for construction and rehabilitation. The appropriation provision, together

with the proviso (Keating Amendment) as it appears in USBR's Construction and Rehabilitation appropriation for fiscal year 1965, reads as follows:

"CONSTRUCTION AND REHABILITATION

"For construction and rehabilitation of authorized reclamation projects or parts thereof (including power transmission facilities) and for other related activities, as authorized by law, * * *:

Provided; That no part of this appropriation shall be used to initiate the construction of transmission facilities within those areas covered by power wheeling service contracts which include provision for service to Federal establishments and preferred customers, except those transmission facilities for which construction funds have been heretofore appropriated, those facilities which are necessary to carry out the terms of such contracts or those facilities for which the Secretary of the Interior finds the wheeling agency is unable or unwilling to provide for the integration of Federal projects or for service to a Federal establishment or preferred customer * * *."

In connection with the above proviso, the following situation exists as to the possibility of USBR's constructing a transmission line from Granite Falls to Marshall.

1. Northern States Power Company owns and operates a 115-kilovolt transmission line from Granite Falls to Marshall, Minnesota.

2. Northern States Power Company, under a contract with USBR, has been wheeling USBR power

over this line to serve, among others, the Lyon-Lincoln rural electric cooperative.

3. Rural electric cooperatives are considered to be preferred customers.

4. Through fiscal year 1965, no funds had been appropriated for USBR's construction of a line from Granite Falls to Marshall.

In view of the above facts, and assuming that the Keating Amendment will continue to be included in Public Works Appropriation Acts, it appears that USBR may not be able to construct the Granite Falls to Marshall line unless (1) Northern States Power Company is unable or unwilling to continue to serve as a wheeling agency for USBR or (2) the Congress specifically provides that the line be built.

As of December 31, 1965, USBR had not made a commitment to build the Granite Falls to Marshall line.

REA considered a second possibility for offsetting savings under the joint plan in the event that USBR would not construct the Granite Falls to Marshall line. REA believed that, if East River constructed this line in accordance with specifications of the Missouri Basin Systems Group, the facility would be included in a proposed pooling agreement under which the costs of operation would be shared to some extent by other members of the Group. According to REA records, savings in costs of operating the Granite Falls to Marshall line during the 1966-75 period would amount to about $350,000 if a pooling agreement between East River and the Group materialized.

REA records showed also that it inquired of USBR, as a power supplier to the Missouri Basin Systems Group,

concerning the possibility that USBR might consider and advocate the incorporation of the Granite Falls to Marshall line into the Group should the line be constructed by East River. In a written reply dated March 25, 1965, USBR advised REA that, "* * * whether or not a line is to be included in the Joint System is a matter for the Systems Group to decide." During our review we found that, at least 10 months prior to loan approval, East River had discussed its plans for construction of a Granite Falls to Marshall line with the Missouri Basin Systems Group. We found no evidence to indicate that the Missouri Basin Systems Group was receptive to such a possibility, and we noted that, as of December 31, 1965, no agreement had been reached.

REA considered a third possibility for offsetting savings under the joint plan in the event that USBR would not construct the Granite Falls to Marshall line or the line built by East River would not be accepted into the Missouri Basin Systems Group. This third possibility was that East River could obtain use of the excess transmission capacity available in Northern States Power Company's existing transmission line between Granite Falls and Marshall at lower annual costs in lieu of East River's construction and operation of its own facilities between these locations. The REA records do not show the amount of savings that could be realized if East River obtained use of the excess transmission capacity in Northern States Power Company's existing transmission line between Granite Falls and Marshall. It appears from our review of the REA records that the first contact with Northern States Power Company regarding this possibility was made by East River about 2 weeks after REA approved the independent

plan; however, as of December 31, 1965, no agreement had been reached.

Conclusion

In view of USBR's advice to REA about 2 months prior to the announced approval of the loan to East River that it could not make a commitment to construct the Granite Falls to Marshall line, and in view of the possibility at present that USBR may not have authority to construct this line because of the Keating Amendment, we believe that, at the time of REA's approval of the independent plan, construction by USBR appeared unlikely and thus there was little possibility of realizing savings in loan funds or operating costs.

Although East River discussed the inclusion of the Granite Falls to Marshall line with the Missouri Basin Systems Group prior to loan approval, we found no evidence which would indicate that this possibility was likely to materialize. Also, since East River's first contact with Northern States Power Company concerning the use of excess transmission capacity available in its existing Granite Falls to Marshall line did not occur until after loan approval, we are unable to evaluate the reasonableness of REA's position at the time of loan approval that either of these possibilities should be considered as offsetting the operating-cost savings under the joint plan.

As noted above, none of the three possibilities had materialized as of December 31, 1965.

Evaluation of REA statement that the marginal savings of the joint plan might be offset by possible savings through utilization of excess capacity and because of greater operational flexibility

According to REA, another factor contributing to the decision to approve the independent plan was that this plan would offer East River possibilities for utilizing excess capacity in its system for wheeling power and energy to USBR preference customers and for non-Rural Electrification Act beneficiary loads in its Minnesota service areas. Such arrangements, according to REA, would result in additional revenues and lower power costs to East River. In addition, the independent plan, according to REA, would offer East River greater operational flexibility for participating in other power supply arrangements in the future.

REA records do not show what specific future arrangements were envisioned whereby it would be possible for East River to (1) utilize excess capacity in its system or (2) participate in future power arrangements.

We believe that an electric cooperative which owns and operates its own transmission facilities is in a position to take advantage of an opportunity to utilize excess capacity in its lines and that it generally possesses greater operational flexibility for participating in future joint transmission arrangements than would an electric cooperative which is dependent on the transmission facilities of others. Thus, the independent plan would appear to offer possibilities for future savings to East River which might not exist under the joint plan. On the basis of our review, the extent of any such possible savings was not determinable either as of the time of loan approval or as of December 31, 1965.

Conclusion

Inasmuch as REA records do not show any specific future arrangements envisioned by REA whereby East River could (1) utilize excess capacity in its system or (2) participate in future power arrangements, we are unable to make a determination as to amounts of possible future savings or periods of time when possible future savings might result from such arrangements under the independent plan; nor are we able to evaluate the likelihood that such future arrangements will materialize. However, if such opportunities do arise, we believe that it would be more likely that East River could take advantage of them under the independent plan than under the joint plan.

Evaluation of REA statement that the marginal savings of the joint plan might be offset by the possibility that the joint plan would involve increased costs to East River over which neither East River nor the Companies would have control

Another factor cited by REA in approving the independent plan was that adoption of the joint plan involved the possibility of increased costs to East River over which neither East River nor the Companies would have control. In a letter to REA dated November 25, 1964, East River expressed concern, upon advice of its attorneys, that adoption of the joint plan could jeopardize East River's favorable personal property tax treatment in South Dakota. East River estimated that the payment of personal property taxes in lieu of the tax treatment available to cooperatives could cost East River $3.6 million over a 10-year period. The adoption of the independent plan would not, however, in the opinion of REA, jeopardize East River's tax treatment.

Under the South Dakota property tax statute, a rural electric cooperative pays 2 percent of its gross receipts in lieu of all personal property taxes levied by the State of South Dakota and all of its political subdivisions as long as the cooperative meets certain criteria. East River's attorney advised the Cooperative that under the joint plan East River might not be able to meet the criteria with respect to the number of consumers served per mile of line and thus would lose its favorable personal property tax treatment.

In addition to the above, East River also expressed concern to REA in its letter of November 25, 1964, that the adoption of the joint plan may be considered an unlawful restraint of trade. Our review of REA records showed that East River's attorney advised the Cooperative that the joint transmission agreement proposed by the Companies contained "use of service" or territorial protection provisions which, in his opinion, might be construed to be in restraint of trade and unlawful.

In connection with East River's concern that the joint plan might jeopardize its favorable personal property tax treatment in South Dakota, we note that the applicable tax statute of South Dakota provides that cooperatives which generate, transmit, and/or distribute electrical energy for use solely in rural areas are eligible for the favorable tax treatment. A rural area is defined by the statute as an area not within the boundaries of any city or town having a population in excess of 1,500 inhabitants.

An attorney of the Office of the General Counsel, Department of Agriculture, advised us that, because of the ambiguity of the applicable South Dakota statute and the fact that no legal precedents existed, that Office could not

render a definite opinion as to the validity of the statement made by the East River attorney. He advised us also that, in his opinion, it is possible that East River's favorable personal property tax treatment in South Dakota could be jeopardized under the joint plan. The attorney further stated, however, that East River had not lost its favorable tax treatment although it had been wheeling power and energy to an area with more than 1,500 inhabitants. In this connection, we noted in our review of REA records that East River, as of May 1965, was wheeling USBR power to Madison, South Dakota. This municipality had a population in excess of 5,000 in 1960.

During our review we found no evidence that REA had requested East River to obtain a declaratory judgment regarding the status of its personal property tax treatment in South Dakota under the proposed joint plan. Accordingly, on October 8, 1965, we asked the Administrator to furnish us with information as to why East River had not been requested to seek clarification from appropriate officials of the State of South Dakota as to whether its tax treatment would be adversely affected under the joint plan. In a written reply dated October 20, 1965, the Administrator advised us that he did not consider it necessary to seek a determination that would definitely establish the tax effect of the proposed joint plan, since the potential added tax burden was treated as a possibility rather than a certainty in REA's cost analysis.

The REA records do not show that an attempt was made to evaluate the reasonableness of the increased costs of operation of $3.6 million which East River estimated might be incurred if the favorable personal property tax treatment were lost; however, the REA records state that,

if the favorable tax treatment is lost, "* * * serious economic damage to East River's security and effectiveness as an REA borrower would occur." The REA records do not contain information which would enable us to evaluate the reasonableness of East River's estimated additional costs of operation over a 10-year period.

In connection with East River's concern that adoption of the joint plan might be considered an unlawful restraint of trade because of territorial protection provisions in the joint transmission agreement proposed by the Companies, the REA records show that REA did not share East River's concern in this matter; on the other hand, REA stated that it was "* * * not an unreasonable possibility." The REA records show also that REA believed that this question would not be raised if the independent plan was adopted.

The REA records show that the territorial protection provisions contained in the joint transmission agreement proposed by the Companies had been prepared by REA. The provisions stipulated that East River and the Companies agree to avoid pirating each other's existing customers. We note that similar provisions are included in contracts approved by REA between 33 other REA borrowers and their power suppliers in South Dakota and Minnesota. It appears that the territorial protection provisions in the joint plan proposal were acceptable to REA and the Companies but were objectionable to East River. Although REA did not share East River's concern in this matter, REA considered this expression of concern as further evidence of East River's reluctance to accept the joint plan.

REA concluded that the objections raised by East River concerning the personal property tax question and the

restraint-of-trade question "* * * may have some merit * * *" and that, since East River was not receptive to the joint plan and since "* * * it is axiomatic that full cooperation between parties is essential to the successful operation of any joint operation agreement, this attitude would in itself peril the success * * *" of the joint plan. On the basis of our examination of REA records, it is evident that East River was strongly opposed to the joint plan.

Conclusion

On the basis of our review, it appears that East River's contention that it might incur an additional cost of $3.6 million over a 10-year period because its favorable property tax treatment in South Dakota might be lost represented a significant economic factor for consideration in evaluating the relative merits of the independent and the joint plan.

We believe that, before REA chose to use the possible loss of East River's present tax status as a factor in rejecting the joint plan, REA should have (1) required East River to resolve its personal property tax status with the State of South Dakota and (2) determined the effect of additional costs of operation, if any, on the joint plan. In the absence of such action by REA, we are unable to evaluate the likelihood that East River might have lost its favorable tax treatment under the joint plan or the effect that such a loss would have on the costs of operation under the joint plan.

After consideration of REA's statement that full cooperation between parties is essential for the success of any joint arrangement, we believe that REA's concern that full cooperation did not appear possible under such an ar-

rangement is not without basis in view of East River's evident reluctance to enter into the joint plan. We believe, however, that some of this reluctance might have been overcome if REA had attempted and had been successful in its attempt, to show East River that under the joint plan (1) the favorable tax treatment would not be lost, (2) investments would be lower when considered over a longer period of time, (3) costs of operation would be lower, and (4) the territorial protection provisions would not, in REA's opinion, be an unlawful restraint of trade.

OVERALL CONCLUSION ON REVIEW OF THE COST AND FEASIBILITY OF THE STRAIGHT-WHEELING, JOINT, AND INDEPENDENT TRANSMISSION PLANS

On the basis of our review of the cost and feasibility of the straight-wheeling, joint, and independent transmission plans considered by REA prior to its approval of the independent plan, we believe that, solely on the basis of the foreseeable benefits of the joint plan—that is, estimated savings of $647,000 of investments over a longer period of time and estimated savings of $138,000 in costs of operation during a 10-year period—adoption of the joint plan would have resulted in greater economies to East River than would the adoption of the independent plan. In addition, REA considered the joint plan to offer a more reliable system than the independent plan offered.

We noted that, in approving the independent plan, REA cited certain possibilities for achieving economies under this plan which might offset the foreseeable benefits of the joint plan. The Administrator stated that, while no one of the factors, as discussed in this report, when considered

separately, might have resulted in the approval of the independent plan, the combination of these factors would justify approval of the independent plan.

We believe that REA did not fully explore the possibilities discussed in this report in order to ascertain their likelihood of occurring and the resultant effect on the alternative plans. To what extent the results of further exploration might have affected REA's decision to approve the independent plan cannot be measured as of the time of loan approval; nor is it evident, as of December 31, 1965, that developments subsequent to the loan approval have either confirmed or disproved that such possibilities will materialize.

APPENDIX I

UNITED STATES SENATE

Committee on Appropriations

August 18, 1965

Mr. Joseph Campbell
Comptroller General of the
United States
Washington, D.C.

Dear Mr. Campbell:

Pursuant to general directions in Senate Committee Report 497, accompanying the Agricultural Appropriation Bill for 1964, the Administrator of the Rural Electrification Administration issued procedures to carry out these directions, which were printed in the hearings for fiscal 1965.

During the hearings this year, the attention of the Committee was directed to the loan announced on May 24, 1965 to the East River Power Cooperative, Inc. Madison, South Dakota, for the construction of transmission facilities in the aggregate amount of $6,136,343. Committee examination resulted in conflicting testimony from the private power supplier versus that of the Administrator of the Rural Electrification Administration, and near the conclusion of the hearings I requested that both sides—namely, the REA and the representatives of the Northern States Power Company of Minneapolis, Minnesota—submit the whole record in sufficient detail as would enable your office to make an independent evaluation. It is requested

that you make a thorough examination of the cost and feasibility of each of the three transmission plans considered by the REA prior to its decision to make the loan to the East River Cooperative, and then submit your findings and evaluation to the Committee.

[The deleted two paragraphs of this letter relate to a request for our review of another loan approved by the Rural Electrification Administration. The results of this review were reported to the Chairman on December 17, 1965 (B-157545).]

Yours faithfully,

SPESSARD L. HOLLAND, Chairman
Subcommittee, Department of
Agriculture and Related Agencies

SLH:RS:d

APPENDIX I

ESTIMATED INVESTMENTS REQUIRED BY EAST RIVER FOR STRAIGHT-WHEELING, JOINT, AND INDEPENDENT TRANSMISSION PLANS FOR THE YEARS 1965 THROUGH 1976 (note a)

	Initial loan funds (note b) 1965 through 1968 (note c)		
	Straight Wheeling	Joint	Independent
FACILITIES:			
Transmission lines	$ —	$1,382,000	$1,434,000
Substations	279,000	579,000	358,000
Transmission taps	269,000	269,000	100,000
Total	$548,000	$2,230,000	$1,892,000
HIGHER OR LOWER (—) INVESTMENT FOR:			
Straight-wheeling plan compared with independent plan			—$1,344,000
Joint plan compared with independent plan			338,000

APPENDIX II

Initial loan funds and additional investments (note b) 1965 through 1974 (note c)			Initial loan funds and additional investments (note b) 1965 through 1976 (note c)		
Straight Wheeling	Joint	Independent	Straight Wheeling	Joint	Independent
$ —	$1,382,000	$1,434,000	$ —	$1,382,000	$1,814,000
328,000	628,000	707,000	328,000	628,000	1,012,000
269,000	269,000	100,000	269,000	269,000	100,000
$597,000	$2,279,000	$2,241,000	$597,000	$2,279,000	$2,926,000
		—$1,644,000			—$2,329,000
		38,000			—647,000

[a] Prepared from REA records.

[b] The amounts shown during the 1965-68 period represent initial REA loan fund requirements of East River. The amounts shown as estimated investments required by East River during the periods 1965-74 and 1965-76 include the initial REA loan fund requirements as shown in the 1965-68 period *plus* the estimated additional investments during the remaining years.

[c] The periods covered in this appendix are included because (1) the 1965-68 period was used by REA in support of its determination that the independent plan would result in saving of $338,00 of loan funds, (2) the 1965-74 period covers a usual 10-year period considered by REA in their power supply surveys, and (3) the 1965-76 period includes the anticipated investment, as computed by REA, which will be required under the independent plan by East River in 1976.

APPENDIX III

ESTIMATED COSTS OF OPERATION UNDER STRAIGHT-WHEELING, JOINT, AND INDEPENDENT TRANSMISSION PLANS DURING THE PERIOD 1966 THROUGH 1975 (note a)

	Straight Wheeling	Independent	Higher or lower (−) costs of operation for independent plan
		(000 omitted)	
OPERATION AN MAINTENANCE	$ .165	$ 361	$ 196
TAXES	190	483	293
DEPRECIATION	239	598	359
INTEREST	145	415	270
INSURANCE	9	23	14
CARRYING COSTS (note b)	—	26	26
ADDITIONAL POWER AND ENERGY COSTS	224	—	−224
WHEELING COSTS	1,709	—	−1,709
Total	$2,681	$1,906	$−775

	Straight Wheeling	Independent	Higher or lower (−) costs of operation for independent plan
		(000 omitted)	
OPERATION AND MAINTENANCE	$ 332	$ 361	$ 29
TAXES	195	483	288
DEPRECIATION	664	598	−66
INTEREST	463	415	−48
INSURANCE	25	23	−2
CARRYING COSTS (note b)	—	26	26
ADDITIONAL POWER AND ENERGY COSTS	89	—	−89
Total	$1,768	$1,906	$ 138

[a]Prepared from REA records.

[b]Represent costs during 1966 through 1968 of operating a transmission line which must be built in 1965 to provide service to Lyon-Lincoln and Traverse under the independent plan but which will not be required to serve other member cooperatives of East River until 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1352

NORTHERN STATES POWER COMPANY, ET AL.,
PETITIONERS

v.

RURAL ELECTRIFICATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1–28) is reported at 373 F. 2d 686. The opinion of the district court is reported at 248 F. Supp. 616.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1967. The petition for a writ of certiorari was filed on May 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, electric power companies, have standing to attack a proposed loan by the Rural Elec-

263-042—67

trification Administration which will finance the construction of transmission facilities by a rural electric cooperative, thereby freeing the cooperative from the necessity of leasing petitioners' transmission facilities.

STATUTES INVOLVED

The relevant provisions of the Rural Electrification Act and the Administrative Procedure Act are printed in Pet. App. D.

STATEMENT

REA is an agency within the Department of Agriculture. The Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C. 901 *et seq.*, makes REA responsible for making loans to finance the construction and operation of generating plants and electric transmission and distribution systems which will furnish electric energy to rural areas not receiving central station power. The procedures applicable to such loans are prescribed in an REA policy statement (REA Bulletin 111–3, 29 Fed. Reg. 2765–2766; Pet. App. 64–68) which requires the Administrator of REA to (1) make a survey and determine wherein existing or proposed power supply or transmission contracts are unreasonable, (2) advise present suppliers or transmitters why their contracts are unreasonable, and (3) attempt to have the contracts modified to make them reasonable.

On May 26, 1965, following extensive but unsuccessful negotiations between REA, East River Electric Power Cooperative, Inc., and petitioners (electric power companies) concerning the making of reasonable transmission contracts, REA approved a loan to East River in the amount of $5,919,000 for the construction by East River of its own transmission facili-

ties in Minnesota and South Dakota (R. 26, 27–29).[1] Before approving the loan REA had conducted the required power survey (R. 27) and had informed petitioners wherein their final proposals were, in the agency's view, unreasonable (R. 29; S.R. 113–115).

On August 12, 1965, petitioners filed this action to enjoin REA from making the loan funds available to East River. Petitioners alleged, *inter alia,* that REA had failed to comply with its own policy bulletin in that it had failed to advise petitioners wherein their October 2, 1964, proposal was unreasonable and to endeavor to have the proposal made reasonable (R. 20); and that if East River obtained the loan funds and constructed the contemplated facilities, petitioners would suffer pecuniary damage in excess of one million dollars by the displacement of their present transmission service to East River (R. 22). REA Bulletin 111–3 was invoked, in conjunction with Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, as conferring standing to sue (R. 10, 14–15).

REA moved to dismiss the complaint, one ground being that petitioners lacked standing to maintain the action (R. 25). The district court denied the motion (R. 43) and entered a preliminary injunction restraining REA from disbursing the loan funds to East River (R. 100). The court of appeals reversed, and ordered the complaint dismissed, on the ground that the REA Bulletin did not confer any legally enforceable rights upon the petitioners to challenge the making of the loan (Pet. App. 27–28).

[1] "R." refers to the record appendix filed by respondents in the court of appeals, "S.R." to petitioners' supplemental record appendix in that court.

ARGUMENT

The single question presented by the petition is whether an electric power company has standing to challenge a REA loan to a competing electric cooperative on the ground that the loan was approved without compliance with procedures prescribed in a policy bulletin issued by the REA Administrator. As the court below observed (Pet. App. 14, n. 12), the precise issue was resolved adversely to the power companies by the Fifth Circuit in *Rural Electrification Administration* v. *Central Louisiana Electric Co.* (*"CLECO"*), 354 F. 2d 854. Certiorari in that case was denied by this Court earlier this Term. 385 U.S. 815. The decisions of the Fifth and Eighth Circuits are clearly correct, and nothing has happened since the denial of certiorari in *CLECO* to warrant review of the question by this Court.

1. This Court has repeatedly held that damage flowing from lawful competition, though assisted by assertedly unlawful federal action, is without more *damnum absque injuria*. See *e.g., Alabama Power Co.* v. *Ickes*, 302 U.S. 464; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118.[2] And even

[2] See, also, *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884; *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815; cf. *Pennsylvania R. Co.* v. *Dillon*, 335 F. 2d 292 (C.A. D.C.), certiorari denied *sub nom. American Hawaiian S.S. Co.* v. *Dillon*, 379 U.S. 945; *Pittsburgh Hotels Assoc.* v. *Urban Redevelopment Authority*, 309 F. 2d 186 (C.A. 3), certiorari denied *sub nom. Hilton Hotels Corp.* v. *Urban Redevelopment Authority*, 372 U.S. 916; *Berry* v. *Housing and Home Finance Agency*, 340 F. 2d 939 (C.A. 2); *Taft Hotel Corp.* v. *Housing and Home*

petitioners appear to recognize (at least implicitly) that nothing in the terms of the Rural Electrification Act evinces a congressional design to accord any power company the right to prevent loans under the Act. And the legislative history shows that Congress' principal objective was to provide electric power to those in rural areas who were without it and that there was no purpose to protect private power companies from competition by the cooperatives. See, *e.g.*, 80 Cong. Rec. 2752; Hearings before House Committee on Interstate and Foreign Commerce on S. 3483, 74th Cong., 2d Sess., p. 56–57. The Act neither provides for notice or hearing with respect to proposed loans nor contains any reference to "person aggrieved,"[3] "any person who will be adversely affected",[4] "any party in interest",[5] or any of the other phrases found in statutes which have been construed to confer a right to sue. Compare *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476–477. For these reasons, the Courts of Appeals for the District of Columbia Circuit and the Fifth (as

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Finance Agency, 262 F. 2d 307 (C.A. 2), affirming 162 F. Supp. 538 (D. Conn.), certiorari denied, 359 U.S. 967.

[3] *E.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a); Section 24(a) of the Utility Holding Company Act, 15 U.S.C. 79x(a); Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b); *Section* 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[4] *E.g.*, Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[5] Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20); cf. Section 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1486(a) ("any person disclosing a substantial interest").

well as Eighth) Circuit have held that the Rural Electrification Act does not confer standing upon power companies to challenge loans approved by the REA administrator. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, certiorari denied, 350 U.S. 884; *Rural Electrification Administration* v. *Central Louisiana Elec. Co.,* 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815. The *Kansas City Power & Light* case was decided more than a decade ago, but Congress has not, since that decision, seen fit to amend the Act to provide for judicial review of the approval of loan applications by potential competitors.[6]

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[6] In 1962 Mr. Walter Bouldin of Alabama Power Company proposed to the House Committee on Agriculture that the Rural Electrification Act be amended to read:

> *Provided*, That loans for generating capacity shall not be made by the Administrator where there is an adequate supply of electric energy available from investor-owned, taxpaying sources at publicly regulated rates and conditions of service, nor shall such loans be made until after due public notice has been given by the Administrator and provision made for interested parties to be heard in connection therewith.

Hearings on Food and Agriculture Act of 1962 before House Committee on Agriculture, 87th Cong., 2d Sess., pp. 680–681. The House Committee declined to take favorable action on this proposed amendment. In 1963, Mr. Bouldin's proposal was incorporated in two House bills, H.R. 6852 and H.R. 7213, 88th Cong., 1st Sess. These bills in express terms provided for judicial review:

> Provided further that any determination by the Secretary of Agriculture under the Act with respect to generation and transmission loans shall be subject to review in the same manner as orders of the Secretary subject to the act of December 29, 1950, as amended * * * [the Administrative Orders Review Act, 5 U.S.C. 1031 *et seq.*]

The House declined to take favorable action on these bills also.

There is accordingly no merit to petitioners' contention that they have standing to complain of alleged violations of REA Bulletin 111–3. The bulletin simply sets forth the procedures that the Administrator follows in administering the lending program authorized by the Act. Whether or not the bulletin has the status of a regulation, it obviously confers no greater rights upon competing power companies than does the Act itself.[7] Thus, since the power companies have no standing to enforce the terms of the Act, perforce they cannot attack the proposed REA loan on the assertion that the provisions of the bulletin have been violated.

2. Nor is the decision below in conflict with the decision of the Sixth Circuit in *Kentucky Utilities Co.* v. *Tennessee Valley Authority* (No. 16,491, decided November 15, 1966), certiorari granted on March 28, 1967, No. 1063, O.T. 1966, *Kentucky Utilities*. involved a 1959 amendment to the Tennessee Valley Authority Act (Public Law 86–137, 73 Stat. 280) prohibiting TVA from becoming a supplier of power outside of its primary service area as of July 1, 1957. Regardless of whether the Sixth Circuit's determination that the amendment conferred standing upon existing power suppliers to challenge new TVA power supply contracts is sound, it is of no assistance to petitioners here. In the absence of a traditional basis of standing, the right to maintain an

[7] While petitioners suggest (Pet. p. 12) a disagreement between the Fifth Circuit in *Central Louisiana* and the court below as to whether the bulletin is a regulation, both courts—as mentioned earlier—concluded that, however regarded, the bulletin does not provide a basis for standing to sue REA.

action obviously depends on the intent of the framers of the particular statute sought to be sued under. The Sixth Circuit's determination was based upon an interpretation of the legislative history of the TVA Act amendment as disclosing a purpose to protect private power companies from encroachments by TVA. At a minimum, we submit, such a purpose must appear before standing predicated solely on competitive injury may be asserted. And as previously noted, *supra,* p. 5, it is clear that neither the legislative history nor the express provisions of the Rural Electrification Act support a claim that Congress intended any protection of existing power suppliers or transmitters against competition by REA loan recipients.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[8]

THURGOOD MARSHALL,
Solicitor General.
BAREFOOT SANDERS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
HARVEY L. ZUCKMAN,
Attorneys.

MAY 1967.

[8] Petitioners' discussion of the import of 28 U.S.C. 1361 (Pet. 19–21) is irrelevant. The availability of the mandamus remedy provided in Section 1361 depends upon the plaintiff's standing to maintain the action.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1352

NORTHERN STATES POWER COMPANY, A CORPORATION AND OTTER TAIL POWER COMPANY, A CORPORATION

Petitioners

VS.

RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, AS ADMINISTRATOR OF THE RURAL ELECTRIFICATION ADMINISTRATION; THE UNITED STATES DEPARTMENT OF AGRICULTURE; ORVILLE L. FREEMAN, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; AND JOHN DOE AND MARY ROE, WHOSE TRUE AND CORRECT NAMES ARE UNKNOWN TO PLAINTIFFS

Respondents

REPLY OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 1352

NORTHERN STATES POWER COMPANY, A CORPORATION AND OTTER TAIL POWER COMPANY, A CORPORATION

Petitioners

VS.

RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, AS ADMINISTRATOR OF THE RURAL ELECTRIFICATION ADMINISTRATION; THE UNITED STATES DEPARTMENT OF AGRICULTURE; ORVILLE L. FREEMAN, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; AND JOHN DOE AND MARY ROE, WHOSE TRUE AND CORRECT NAMES ARE UNKNOWN TO PLAINTIFFS

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ARGUMENT

The Administrator's insistence in characterizing his regulations and procedure as mere "policy"[1] shows only that

[1]A characterization rejected by the Federal District Court and either rejected or regarded as meaningless by the Eighth Circuit Court. The

he will continue to claim that denial of standing here or denial of certiorari in *CLECO*[2] represented victory on the merits of this misguided contention. The issue here should not be perverted by such an effort. Nor should it be obscured by the Administrator's attempts to garble it by reference to claimed "standing predicated solely on competitive injury".[3]

> "This loss is not the incident of more effective competition. * * *. It is injury inflicted by denying to the plaintiffs equality of treatment." Brandeis, J. in the *Chicago Junction Case*, 264 U.S. 258.

Kansas City Power & Light Co. v. McKay, 225 F. 2d 924, cert. den. 350 U.S. 884, is commended to this Court by the Administrator as authority not on the basis of its soundness or application but on the basis that it is more than ten years old. In suggesting a comparison with *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, the Administrator unwittingly directs attention to the serious question whether *Kansas City* conforms to the reasoning in *Sanders*.[4] Certainly *Kansas City* and the Court that decided it do not support respond-

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persistence in this misclassification dramatizes the executive arrogance ["unreviewable discretion"] of respondents. Judicial abnegation of review has only nurtured this attitude.

[2] *Rural Electrification Administration v. Central Louisiana Electric Co.*, (5th Cir. 1966) 354 F. 2d 859, cert. den. 385 U.S. 815.

[3] Both the Federal District Court and the Eighth Circuit Court disregarded the Administrator's persistent claim that this was the sole basis of claimed standing.

[4] If the Comptroller General is correct that economies were lost or ignored by the Administrator's decision is the Eighth Circuit's implied suggestion that the consumer, not petitioners, have standing realistic in light of *Sanders*?

ents' position in this case[5] *Kansas City's* only real value here is to underscore the fact that since *Kansas City* was decided the Administrator has seen the adoption (at Congress' behest) of his regulations with which he now says the courts are powerless to force compliance. Whether Congress' purpose be to protect the "suppliers" such as petitioners from competition or only to insure their fair treatment and the economical expenditure of government funds in recognition that both companies such as petitioners and the cooperatives are to co-exist is a vain quibble.

Petitioners' recognition as a class is clear. That Congress' directions to the Administrator to adopt the regulations here evidences a purpose is inescapable. Neither the Act nor the regulations preclude judicial review. Petitioners' treatment "* * * without compliance with procedures * * *"[6] must be conceded. Thus standing within the meaning of *Sanders* is manifest.

There is no real difference between *Kentucky Utilities*[7] and the instant case. In one case standing is predicated on statutory amendment, and in the other it is predicated on regulation. Both are law which even the Eighth Circuit recognized *should* be followed. With *Kentucky Utilities* now under review by this Court, certiorari in the instant case should be granted.

We cannot share the Eighth Circuit's apparent view that we are in an area "where generally the Executive and the legislative are supreme" when the issue is one of fair treat-

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[5]A careful comparison of *Pennsylvania Railroad Co. v. Dillon*, D. C. Cir., 335 F. 2d 292, with *Gonzales v. Freeman*, D. C. Cir., 334 F. 2d 570, can lead only to this conclusion.

[6]Respondents' Brief, p. 4.

[7]Cert. granted on March 28, 1967, No. 1063, O.T. 1966.

ment, not technical decision. In that area, the courts are still supreme.

Respectfully submitted,

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